SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No.

LAURA ORMSBY AND B. RUSH FIELD, EXECUTORS OF THE ESTATE OF FRANK G. ORMSBY, DECEASED, PETITIONERS,

vs.

LOUISE CHASE, BY JESSE BLYTHE, PROCHEIN AMI, AND LOUISE CHASE, IN HER OWN RIGHT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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[fols. a & 1]

IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA

Louise Chase, by Jesse Blythe, Prochein Ami, and Louise Chase, in Her Own Right, Plaintiff-Appellant,

vs.

Laura Ormsby and B. Rush Field, Executors of the Estate of Frank G. Ormsby, Deceased, Defendants-Appellees

Relevant Docket Entries

Apr.	12, 1927.	Præcipe to issue Summons filed.
"	12, "	Summons exit returnable 1st Mon. in May 1927.
"	12, "	Statement of Claim filed.
May	2, "	Appearance of Robert T. McCracken for defendants filed.
"	7, "	Summons Returned on April 25th, served as to each defendant and filed.
"	10, "	Affidavit of defense filed.
Oct.	23, 1928.	Præcipe to place case on Trial list filed.
June	10, 1931.	Stipulation of Counsel as to Argument of questions of law filed.
Sept.	9, 1931.	Argued sur preliminary question of law.
"	24, "	Opinion Dickinson J deciding question of law in favor of defendant filed.
Sept.	28, 1931.	Appearance of C. Brewster Rhoads for defendant filed.
Jan.	8, 1932.	Jury sworn.
"	8, "	In open Court, Judgment of non suit.
"	8, "	Motion to strike off Compulsory non suit. In open court motion denied.
Jan.	8, 1932.	Order of Court denying motion to strike off Compulsory non suit, exceptions thereto
[fol. 2]		and order of Court sealing Bill filed.
Jan.	13, "	Præcipe to enter final judgment of non suit filed. Judgment accordingly.
Feb.	20, "	Exceptions and Order of Court allowing exceptions filed.

Feb. 20, 1932. Assignments of error filed.
" 20, " Petition for appeal filed.
" 20, " Order of Court allowing petition for appeal filed.
Feb. 20, 1932. Bond for costs sur appeal with surety in $200 and decree approving bond filed.
" 20, " Praecipe for transcript of record sur appeal filed.
" 23, " Citation allowed and issued.
" 23, " Copy of notice of appeal filed.
" 27, " Citation returned, service accepted and filed.

[fol. 3] IN UNITED STATES DISTRICT COURT

STATEMENT OF CLAIM

Louise Chase, by Jesse Blythe, Prochein ami, and Louise Chase in her own behalf, plaintiff herein, claim of the estate of Frank G. Ormsby, Deceased, defendant, the sum of Fifty Thousand ($50,000.00) Dollars upon a cause of action whereof the following is a statement:

1. Louise Chase is a minor and a resident of the city of St. Louis, Missouri.

2. The late Frank B. Ormsby was a resident of the city of Easton, county of Northampton and state of Pennsylvania, having died in Easton, Pa. on June 14, 1926. Letters testamentary have been issued in the Orphan's Court of Northampton County to Laura G. Ormsby and B. Rush Field as Executors.

3. During the life time of Frank G. Ormsby, he was the owner of a certain six story and basement apartment house or dwelling place situated at 529 West 111th St., New York City, wherein he leased rooms and apartments for profit.

4. The plaintiff was on or about October 17, 1925, together with her mother, Florence Chase, a tenant in the apartment house situated at 529 W. 111th St., New York City, owned, operated and maintained by the said Frank G. Ormsby.

[fol. 4] 5. The said Frank G. Ormsby maintained in the said apartment house as a part of its equipment, a certain elevator for the use of, and which was actually used by his patrons, tenants, servants, agents and employees in carrying persons from floor to floor.

6. The plaintiff, to wit: on or about October 17, 1925, was lawfully in and about the premises owned by the said Frank G. Ormsby, and together with her mother, Florence Chase, she entered the aforementioned elevator at the fifth floor.

7. Suddenly and without warning, with great force and violence, the said elevator being then and there in the control of Albert McCoy, agent and employee of the said Frank G. Ormsby, fell from the fifth floor to the basement.

8. The plaintiff avers that she and her mother, the said Florence Chase, were lawfully in and upon the said elevator, and that the sudden descent of the elevator was wholly without negligence on her part, but on the contrary was directly caused by the negligent maintenance, control and operation on the part of the said Frank G. Ormsby, in that.

(a) The said Frank G. Ormsby failed to employ a competent person to operate said elevator.

[fol. 5] (b) The said Frank G. Ormsby, his agents and employees failed to maintain proper control of the operation of said elevator so as to prevent its sudden, sharp and violent descent.

(c) The said Frank G. Ormsby failed to maintain said elevator in proper mechanical condition.

(d) The said Frank G. Ormsby failed to maintain an adequate safety device on said elevator.

(e) The said Frank G. Ormsby failed to maintain a proper counterweight which would operate as a safety check in the event of the failure in any of the mechanical features in said elevator.

(f) The said accident was due to the careless operation and maintainence of the elevator by the said Frank G. Ormsby, his agents and employees.

(g) Plaintiff avers that the defendant knew, or should have known, of the improper, dangerous and unsafe condition of the said elevator.

9. The said Florence Chase sustained injuries as a result of the fall of said elevator from which she died, and the said Louise Chase sustained serious bodily injuries as follows: to-wit, The right leg of the said Louise Chase was broken in such a manner that it became necessary to amputate it below the knee; the left leg was so badly broken that it is permanently crippled; her spine was severely injured and her whole body was badly bruised and her sys-
[fol. 6] tem sustained a severe nervous shock.

10. By reason of said injuries the plaintiff was obliged to lay out and expend money for medicine and medical attention and the employment of persons to attend her, that she suffered and continues to suffer great pain and distress, both mental and physical, all of which is due to the defendant's negligence as aforesaid.

Wherefore the plaintiff claims of the defendant the sum of $50,000.00 as compensation for the injuries thus sustained.

Jesse W. Blythe, Guardian for Louise Chase. Louise Chase. (Signed) E. J. and J. W. Fox, Attorneys for the Plaintiff.

Duly sworn to by Louise Chase. Jurat omitted in printing.

[fol. 7] IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DEFENSE

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

B. Rush Field being duly sworn according to law, deposes and says that he is one of the above named defendants and one of the executors of the Estate of Frank G. Ormsby, Deceased, that said defendants have a just, true and legal defense to the whole of the plaintiff's claim and make answer to the Statement of Claim as follows:

1. Deponent has no knowledge or means of knowledge for ascertaining the truth of the averments of paragraph 1 of the Statement of Claim and if material to this cause demands proof thereof.

2. Admitted.

3. Admitted.

4. Deponent avers upon information and belief that the apartment at 529 West 111th Street, New York City, referred to in paragraph 4 of the Statement of Claim, was leased to Florence Chase, the mother of the plaintiff and that said Florence Chase was therefore the tenant of the said apartment.

[fol. 8] 5. Deponent is advised by counsel, believes and therefore avers that it is unnecessary for him either to answer or deny the averments of paragraph 5 of the Statement of Claim.

6. Deponent is advised by counsel, believes and therefore avers that it is unnecessary for him either to answer or deny the averments of paragraph 6 of the Statement of Claim.

7. Deponent is advised by counsel, believes and therefore avers that it is unnecessary for him either to answer or deny the averments of paragraph 7 of the Statement of Claim.

8. Deponent admits that at the time referred to in the Statement of Claim plaintiff and her mother, the said Florence Chase, were in and upon the said elevator. Deponent denies however that the accident referred to in the Statemnt of Claim was caused by or was the result in any particular of negligence of any nature whatsoever in maintenance, control or operation of said elevator on the part of said Frank G. Ormsby, his servants, agents, or employees and particularly denies that said Frank G. Ormsby can be charged with any of the acts of commission or omission refered to in paragraph 8 (a) to 8 (g) inc. of the Statement of Claim respectively.

[fol. 9] 9. Deponent avers that the manner and cause of the death of the said Florence Chase has no relation to the cause of action upon which the Statement of Claim is based

and deponent is therefore advised by counsel, believes and therefore avers that it is unnecessary to answer or deny the allegation of the Statement of Claim concerning the same. Deponent is further advised by counsel, believes and therefor avers that it is unnecessary for him either to answer or deny the remaining allegations of paragraph 9 of the Statement of Claim.

10. Deponent denies that plaintiff has suffered any injuries or has been obliged to expend any moneys on account of any negligence of any nature upon the part of the defendant. Deponent is advised by counsel, believes and therefore avers that it is unnecessary for him to either answer or deny the remaining averments of paragraph 10 of the Statement of Claim.

11. Deponent is further advised by counsel, believes and therefore avers that under the law of the State of New York a right of action against an alleged tortfeasor abates with the death of the allegd tortfeasor and that inasmuch as the alleged accident out of which this suit arises occurred in the State of New York therefore any right of action [fol. 10] which this plaintiff might have had has abated with the death of the said Frank G. Ormsby as referred to in paragraph 2 of the Statement of Claim.

All of which deponent avers to be true and correct to the best of his knowledge, information and belief and expects to be able to prove the same at the trial of this cause.

(Signed) B. Rush Field.

Sworn to and subscribed before me this 9th day of May A. D. 1927. Commission expires March 2, 1929. Claire G. LaVelli, Notary Public, Easton, Pa. (Seal.)

[fol. 11] IN UNITED STATES DISTRICT COURT

STIPULATION PERMITTING DEFENDANT TO FILE AN AMENDED AFFIDAVIT OF DEFENSE

It is hereby stipulated and agreed by and between E. J. & J. W. Fox, counsel for the above named plaintiff, and Robert T. McCracken, counsel for the above named defend-

ant, that the Affidavit of Defense heretofore filed in the above entitled case may be amended by substituting for Paragraph 11 in the Affidavit of Defense heretofore filed, the following paragraph.

"11. As a further defense to the plaintiff's claim, the defendant is advised, believes and therefore avers that no right of action exists in or may be prosecuted by the plaintiff based upon any tort or negligence of the said Frank G. Ormsby, deceased, or any of his servants, agents or employees against the defendants above named in this Honorable Court or in any other forum, for the following reasons:

"The defendant's decedent, Frank G. Ormsby, departed this life on the 14th day of June 1926 prior to the issuance of the writ in this case. No suit was brought by the plaintiff or by any one on her behalf against the said Frank G. Ormsby during his lifetime. The accident out of which this suit arose took place as averred in the statement of claim at 529 West 111th Street, City of New York, State of New [fol. 12] York. Defendants are advised by counsel and therefore aver that all rights of action for damages caused by said accident are governed by the laws of the State of New York in which State the said accident took place; and that by the laws of said State a right of action against an alleged tort feasor abates with the death of the alleged tort feasor.

"Defendants accordingly aver upon such advice that inasmuch as the alleged accident out of which this suit arises occurred in the State of New York and inasmuch as no right of action was brought against said Frank G. Ormsby, the alleged tort feasor, during his lifetime, that any right of action which existed prior to his death abated with his death and accordingly may not now be prosecuted.

"Deponent respectfully submits said additional defense as a full, complete and separate legal defense to the plaintiff's claim in the above entitled matter and submits that the same may be determined separately and in advance of the trial upon the merits or contemporaneously therewith as to this Honorable Court may seem the more expedient."

It is hereby further stipulated and agreed by and between E. J. & J. W. Fox, counsel for the above named plaintiff, and Robert T. McCracken, counsel for the above named [fol. 13] defendant, that the plaintiff may within fifteen

(15) days after the filing of this stipulation file her reply to the new matter contained in Paragraph 11 of the Affidavit of Defense as hereinbefore amended.

Edward J. Fox, Attorney for Plaintiff. Robert T. McCracken, Attorney for Defendant.

[fol. 14] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO CERTAIN FACTS, ETC.

And now, to wit, this 29th day of May, 1931, it is stipulated and agreed by and between Edward J. Fox, Esq., counsel for the plaintiff, and C. Brewster Rhoads, Esq., counsel for the defendants, in the above-captioned case, that the question of law raised in Paragraph 12 of the affidavit of defense filed herein be argued before the Honorable Oliver B. Dickinson, Judge of the United States District Court for the Eastern District of Pennsylvania, prior to trial on the merits of this cause, with the same force and effect as if the case had proceeded to trial before a jury, witnesses for the plaintiff heard, and at the close of the plaintiff's case a motion for compulsory non-suit had been made by counsel for the defendants for the reason that

"Under the law of the State of New York a right of action against an alleged tortfeasor abates with the death of the alleged tortfeasor and, inasmuch as the alleged accident out of which this suit arises occurred in the State of New York, any right of action which this plaintiff might have had has abated with the death of Frank G. Ormsby, the alleged tortfeasor."

It is further stipulated and agreed that, for the purpose of [fol. 15] the argument of the aforesaid question of law, the following additional facts shall be considered as having been affirmatively proved:

First. The accident out of which this cause of action arises, occurred in the City of New York, State of New York, on October 17th, 1925.

Second. Florence Chase, mother of plaintiff, died on December 22nd, 1925.

Third. Frank G. Ormsby died on June 14th, 1926, at Easton, Pennsylvania, his legal domicile and residence for a period of upwards of twenty years.

Fourth. Benjamin T. Chase, father of the plaintiff, died in St. Louis, Missouri, on July 2nd, 1926.

Fifth. Depositions of witnesses called on behalf of plaintiff were taken in St. Louis, Missouri, on April 27th, 1929, were examined by counsel for the plaintiff and cross examined by counsel for the defendants.

Sixth. The statement of claim was filed on March 17th, 1927.

Seventh. The appearance of Robert T. McCracken as attorney for the defendant, was entered on April 27th, 1927. The affidavit of defense was filed on May 9th, 1927, and the Court is to consider the said pleadings as a part of this stipulation. No question of law is raised by statutory demurrer under the provisions of Section 20 of the [fol. 16] Practice Act of 1915, nor did defendants file a petition in pursuance of the terms of the Act of March 5th, 1925, P. L. 23.

It is further stipulated and agreed that, in the event of denial by this Court of defendants' motion for compulsory non-suit, the cause shall thereupon be set down for trial at the next term of Court; that, in the event this Court sustains defendants' motion for compulsory non-suit and denies motion of plaintiff to strike off the non-suit so entered, an appeal may be taken by the plaintiff upon the record as herein constituted, with the same force and legal effect as if a trial had been had upon the merits and defendants' motion for compulsory non-suit had been granted by the Trial Judge at the conclusion of the plaintiff's testimony, and the motion by the plaintiff to take off the compulsory non-suit had been denied by the Court.

Edward J. Fox, Attorney for Plaintiff. G. Brewster Rhoads, Attorney for Defendants.

[fol. 17] In United States District Court

Opinion of the Court

Sur Statutory Demurrer

Dickinson, J.:

This cause must look for its ruling to the misty subject of the Conflict of Laws. The defendants' decedent was the owner and operator of an elevator. The plaintiff was injured by a fall of the elevator due, as is averred, to the negligence of its operator. The injury, however, was sustained in the State of New York. By the laws of that state the common law maxim is followed that the right of recovery for personal torts dies with the person of the tortfeasor unless an action was begun in his lifetime. The action is brought in Pennsylvania, in which state by statute a different rule prevails, but the action was not brought until after the death of Grimsby who had he not died would have been the defendant. A preliminary question of law is raised, which we discuss as if raised in the method prescribed by the Practice Act of 1915, to the effect that the cause of action died with the tortfeasor, notwithstanding the other fact that the cause of action is personal and transitory. Under the laws of New York the plaintiff would have neither a cause nor a right of action, assuming these two things not to be the same. Under the laws of Pennsylvania [fol. 18] the right to seek a recovery, had the injury been herein sustained, is not denied. The question thus becomes, as we view it, by the laws of which state is the case to be determined?

We have sub-captioned the case and treated it as if a statutory demurrer had been interposed to the plaintiff's action. In fact, the required affidavit raising this as a question at law has not been filed. Counsel have attempted to raise the question by a stipulation. We are unable to see that this can be made effective. It would, however, be a great hardship upon the plaintiff to require her to attend the trial with her witnesses and go through the form of introducing evidence in support of her entire case and then have it thrown out of Court, not on its merits as a case arising under the law of Pennsylvania, but upon the proposition that her case arose, if at all, under the laws of New

York, and judged by that law she had no case. If the question now raised is decided in her favor she would suffer no hardship, but if it is decided against her, an appellate review must take up the whole case, thus subjecting her to the double hardship of the expense of proving her whole case and again to the review of it.

The purpose of the stipulation we think can be reached by determining the suggested question now. If found for her, she may then go on with her entire case, the same ruling now made being made at the trial. The defendants may protect themselves by an exception to the ruling, and the [fol. 19] rights of both parties are thus preserved. If the question is decided against her, then the facts upon which it depends may be stipulated as they have been, and the ruling made repented as a trial ruling, coupled, if need be, with an offer to prove negligence, and the evidence rejected because negligence would then be wholly immaterial. The plaintiff could protect herself by exception, and then have a very short record to have reviewed. This is within the spirit of the stipulation, and we assume the agreement of counsel to it and will pass upon the question raised. The real question we think to be that stated.

The discussion to which we have been treated is most interesting and helpful. The question, as most questions, really turns for its answer upon the approach to it. The plea by which it is raised the plaintiff treats as a plea in abatement; the defendants discuss it as a plea in bar. The plaintiff looks upon the case as one of a right of action which is averred by the defendants to have abated by the death of the tortfeasor; the defendants contend that the plaintiff has no cause of action, the one she once had having been ended by her failure to enforce it by suit when it existed. This is nearly, if not quite, the difference between a question of procedural and one of substantive law. If it is a question of procedure the law of the form controls; if it is a question of substantive law, thence the lex loci is our guide.

The basic principle which underlies the doctrine known as the Conflict of Laws is that of judicial duty or obligation. [fol. 20] If we reverse in part the fact situation the application of this principle will be made clear. If, under the laws of New York, for illustration, the plaintiff had a cause of action and a right of action but the defendant was in

Pennsylvania, suit must here be brought. Assuming the plaintiff under the laws of Pennsylvania to have no cause of action it would, nevertheless, be the duty of the Pennsylvania Court to try the cause as a cause arising under the laws of New York, and to treat the law of that state as the applicable law. Numberless precedents for this could be cited. In many instances there is a like statutory cause of action given by each of the two states but the right of action is different persons. In one case, as in Pennsylvania, it may be given to a surviving spouse or children or parents, and by the laws of the other state to the legal representative of the decedent, or, as in New Jersey, to a special representative as administrator ad prosequendum. The party plaintiff is dictated by the lex loci because the right of action is in the person to whom the cause of action is given, and the legal merits are adjudged in accordance with the same law, but the procedure followed is that of the forum. This is a well settled doctrine.

The question before us is whether the same doctrine applies when the fact situation is reversed in that there is no cause of action under the lex loci, but the law of the forum would give it. If the lex loci controls when a right of action [fol. 21] is given it is difficult to understand why it does not likewise control when one is not given. Viewed from another angle the right given by the laws of Pennsylvania is a statutory right. How can a Pennsylvania statute have an extraterritorial operation? The answer is that it does not have. It may be said with equal truth that the lex loci is likewise without extraterritorial force. Why then should the Courts of the forum give it effect? The answer is to be found in the duty imposed upon the Courts of other states and the obligation which rests upon the tortfeasor. The Courts of the state which gives the right of action would vindicate it if they had jurisdiction of the defendant. Not having such jurisdiction, they cannot try the cause. A Court of another state, which has such jurisdiction, will by analogy to the doctrine of comity do when the Courts of the first state cannot do but will apply the same law which the Courts of the first state would apply. This is, we think, the true doctrine, and judged by it as the Courts of New York would find, that the plaintiff had no case, we must hold likewise, however, much we may prefer the law of

Pennsylvania to that of New York on this particular subject as more consonant with the dictates of natural justice.

There are other phases of the question which might with profit be discussed but we see no need to go into them further than the comment that the conclusion reached is in [fol. 22] accord with the run of the adjudged cases which have been cited to us, among which are:

Davis vs. Mills, 94 U. S. 451;
Spokane vs. Whitley, 237 U. S. 487;
Usher vs. H. R., 126 Pa. 206;
Warren vs. Furstenheim, 35 Fed. Rep. 601;
Martin vs. Wabash, 142 Fed. Rep. 650;
Whitton vs. Bennett, 77 Fed. Rep. 272;
B. & O. vs. Joy, 173 U. S. 226;
Martin vs. B. & O., 151 U. S. 673;
Dimmick vs. H. R., 103 U. S. 2.

We say this notwithstanding the truth that the cases are not uniform in the mode in which the doctrine is expressed. Many of the cases can be reconciled by the distinction before noted between procedural and substantive law. When the plaintiff in a pending suit dies, as in B. & O. vs. Joy, the question of the survival of the action is determined by the lex fori because this is a *procedural* question, but that of whether a right of action in the sense of a cause of action exists when suit is brought is a question of substantive law to be determined by the lex loci.

It must be admitted that the case of Whitton vs. Bennett cannot be so distinguished upon its facts, although the ruling would seem to be so based. As the ruling *made* is phrased, it is that the lex fori "determines the nature and extent of the remedy." This is in entire accord with the doctrine as we have formulated it. The disturbing thought [fol. 23] is that the case arose in a state which gave a right of action but was tried in a state which did not, and the law of the latter was held to prevail. The appellate experience of this case may throw some light upon the quoted ruling. The Appellate Court took occasion to say that it was unnecessary to discuss it.

The question raised is determined in favor of the defendant. If the suggestion we have made is accepted by counsel, a jury may be empanelled at any time.

[fol. 24] IN UNITED STATES DISTRICT COURT

Philadelphia, Pa.,
Friday, January 8, 1932 10:00 a. m.

Before Hon. Oliver B. Dickinson, Jr., and a Jury

Present:

E. J. Fox, Jr., Esq., for plaintiff.
Laurence H. Eldredge, Esq., for defendant.

PLAINTIFF'S OFFER OF PROOF

Mr. Fox: I will make the following offer of proof:

Plaintiff proposes to prove that on the 17th day of October, 1925, Frank G. Ormsby was the owner of a certain apartment house situated in the City of New York at No. 529 West 111th Street. That as the owner of the apartment house he leased rooms and apartments for profit. That among the tenants was Mrs. Florence Chase, the mother of Louise Chase, the plaintiff, who had been occupying an apartment on the fifth floor of said building for a short time prior to said October 17th, 1925. That the said apartment house had a passenger elevator which [fol. 25] was installed for the use of the tenants of said building and was in use on said date and was constantly used by his tenants, servants, and agents for carrying persons from floor to floor. That on the afternoon of October 17th, 1925, the plaintiff with her mother entered said passenger elevator at the fifth floor for the purpose of descending to the first floor, when the elevator suddenly, without warning, with great force and violence fell from the said fifth floor to the basement of the building and as the result of said fall, Florence Chase, the mother, was killed and the plaintiff was seriously and grievously injured. That the character of the injuries which the plaintiff received were such that she has been permanently maimed; that she was taken immediately after the accident to a hospital and it became necessary to amputate her right leg. That the left leg was so badly broken that it is permanently crippled, that her spine was severely injured and her whole body was badly bruised and her system sustained a severe nervous shock. That the said plaintiff by reason of the

injuries received was obliged to remain continuously in a hospital, first in New York and then in St. Louis until September, 1926, where she received constant medical care and attendance of both physicians and surgeons and was unable in consequence of the injuries thus received to give any attention to the question of compensation for such injuries. While she was confined to the hospitals, she was completely paralyzed from the waist down for six months, [fol. 26] she underwent six operations in New York and two in St. Louis and was treated by the Sakin Solution from the time of the injury to the latter part of May, 1926, and treatment to her spine required the application of special casts, which immobilized her entire body for a period of six weeks.

Plaintiff further proposes to prove from the examination of the elevator immediately after its fall that it had been carelessly and negligently constructed and maintained. That the safety device relied on did not grip and that the bumper springs at the bottom of the elevator pit were inadequate and as a result of the force of the fall were driven through the floor of the car. And further plaintiff proposes to prove by tenants and visitors to the building that the elevator had constantly been out of order and in need of repairs and that this situation was known to the agents and/or employees of said Frank G. Ormsby. Further, that the safety device on said elevator had been in service since 1896 and was antiquated and inefficient and not such a safety device as was permitted by the laws of the State of New York at the time of the accident, and was not the best and most approved appliance in general, practical use for the safety of passengers in this elevator.

By reason of the injuries which the plaintiff suffered, she was obliged to pay out and expend money for medicine and medical attention for various *obligations* performed, [fol. 27] for the employment of persons to attend her, for the purchase and constant refitting of an artificial leg and for braces, supports and appliances and will continue to be subjected to such expenses for the balance of her life. By reason of said injuries the plaintiff's earning capacity has been greatly diminished and from the time of the accident she suffered and continues to suffer great pain and distress, both mental and physical, and she has been permanently disfigured and maimed. That these injuries are

the direct consequence of the negligence of the said Frank G. Ormsby. On October 17, 1925, the plaintiff was sixteen years of age. The plaintiff further offers in evidence the statement of claim and the affidavit of defense for the purpose of showing the admissions of the facts by the defendant. The plaintiff also offers the stipulation that was filed of record by counsel in an effort to agree on a state of facts.

Mr. Eldredge: I object to the offer on the ground that the facts offered to be proved are immaterial and irrelevant, in view of the admitted fact that Frank G. Ormsby died before any suit was instituted in any Court by the present plaintiff.

The Court: The objection is sustained and an exception allowed to the plaintiff.

MOTION FOR COMPULSORY NON-SUIT

Mr. Eldredge: I now move for a compulsory non-suit.

[fol. 28] The Court: The motion for a compulsory non-suit is allowed.

Mr. Fox: I would like to file of record our motion to strike off the compulsory non-suit, as entered on this date.

The Court: The motion is denied and an exception allowed to the plaintiff.

[fol. 29] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, MARCH TERM, 1932

No. 4864

LOUISE CHASE, Appellant,

vs.

LAURA ORMSBY and B. RUSH FIELD, Executors of the Estate of Frank G. Ormsby, Deceased, Appellees

ORDER IN FORMA PAUPERIS—Filed Feb. 24, 1932

Upon application by counsel for appellant, it is ordered that the above-entitled cause be docketed without the pay-

ment of deposit for costs, and that same be permitted to be proceeded with in forma pauperis.

Per Curiam:

Buffington, Circuit Judge.

Philadelphia, February 24, 1932.

[File endorsement omitted.]

[fol. 30] Minute entry of argument and submission, April 15, 1932, omitted in printing.

[fol. 31] In United States Circuit Court of Appeals for the Third Circuit, March Term, 1932

No. 4864

Louise Chase, by Jesse Blythe, Prochein Ami, and Louise Chase, in Her Own Right, Plaintiff-Appellant,

v.

Laura Ormsby and B. Rush Field, Executors of the Estate of Frank G. Ormsby, Deceased, Defendants-Appellees

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Before Buffington, Davis, and Thompson, Circuit Judges

Opinion—Filed April 7, 1933

Davis, Circuit Judge:

This is an appeal from an order of the District Court refusing to take off a compulsory nonsuit.

The plaintiff, Louise Chase, a resident of St. Louis, was, on October 17, 1925, temporarily residing in New York City in an apartment house which belonged to Frank G. Ormsby, who was then living at Easton, Pennsylvania, and was a resident and citizen of that Commonwealth and remained so until his death.

[fol. 32] On the morning of October 17, 1925, the plaintiff and her mother entered the elevator of the apartment

house and the elevator suddenly fell from the fifth floor to the basement. Her mother was killed and the plaintiff was seriously injured. She spent about a year and a half in hospitals. For six months she was in a plaster cast. One limb was so badly injured that it had to be amputated and the other was ruined for life.

This suit was brought in the Eastern District of Pennsylvania, where Ormsby resided, against the executors of his estate, to recover damages for the injuries which the plaintiff received in the fall of the elevator, which she alleges was due to the negligence of their testator.

The injuries were received on October 17, 1925. Ormsby died in Easton on June 14, 1926, and suit was brought against his executors in the Eastern District of Pennsylvania on March 17, 1927, within two years after the accident. An affidavit of defense was filed in which it was averred that the death of Ormsby abated the action under the law of New York and that the suit could not be brought and maintained against his executors in Pennsylvania. A question was thus raised under the Pennsylvania pleading in the nature of a demurrer. In Pennsylvania a suit may be brought under the statute against the executors of a tort feasor's estate. A stipulation was entered into by counsel whereby they submitted to the court the question of the right of plaintiff to maintain her action in Pennsylvania. The court in an opinion indicated that the action could not be maintained but said that the question had not been properly raised and suggested that the case be tried to the court and jury. Subsequently a jury was called for the trial of the case and at the trial the plaintiff offered to prove the above facts, but the court sustained an objection to the offer and entered a compulsory nonsuit which [fol. 33] it refused to take off and thereupon the plaintiff appealed.

Passing by minor contentions in the case, the real question is whether or not the cause of action under the above facts survived in Pennsylvania and could be prosecuted against the executors of Ormsby's estate.

The general rule of law declared in both text books and decisions is that substantive rights are determined by the law of the place where the tort was committed, the lex loci delicti commissi, but remedial rights, the rules regulating the machinery by which substantive rights are established,

are determined by the law of the place where those rights are sought to be enforced, the lex fori. Treatise on Conflict of Laws, by Beale, p. 1105; Goodrich on Conflict of Laws, p. 158; Slater v. Mexican National R. R., 194 U. S. 121, 126; Davis v. Mills, 194 U. S. 451; Spokane, etc. R. R. v. Whitley, 237 U. S. 487.

The allegations of negligence in the complaint are assumed to be true.

When the elevator fell and the plaintiff was negligently injured a cause of action arose. This invested the plaintiff with a property right and gave her the right to sue and at the same time it subjected the tort feasor to the liability of being sued. The State of New York could not confine the cause of action within its own borders nor prescribe the court in which the right should be enforced, nor define the procedure therefor. Tennessee Coal, Iron & Railroad Co. v. George, 233 U. S. 354. The action was transitory and wherever Ormsby went this liability went with him and attached to him personally until the moment of his death.

When Ormsby died, did the cause of action die with him or did it survive and the liability to be sued pass over to his executors?

This question depends upon whether it is to be determined by the laws of the State of New York, where the [fol. 34] tort was committed, or by the laws of the State of Pennsylvania, where Ormsby lived and died and where suit was brought. In New York, the death of Ormsby abated the action, but in Pennsylvania it survived. The Act of March 30, 1921 (P. L. 255 Section 35 (b)) provides that, "Executors • • • shall be liable to be sued, either alone or jointly with other defendants, in any such action, except as aforesaid, which might have been maintained against such decedent if he had lived". If Ormsby had lived admittedly this suit might have been brought and maintained against him.

All the authorities agree that survivability of a cause of action is a property right and not a question of procedure. State legislatures have absolute dominion over the property or estate of dead men and determine what causes of action survive and what abate with their death. Whether or not a cause of action survives, is, therefore, determined by the laws of the state where the action is brought and not by the laws of the state in which the injury was inflicted.

The right to revive an action in a federal court is made by the United States Statute to depend upon its survivability. Whether or not it survives will be determined by the federal court in accordance with the laws of the state where the action is brought. This rule of law is supported by the cases discussed below.

In the case of Martin v. Wabash Railway Co., 142 Fed. 650, Judge Grosscup, speaking for the Circuit Court of Appeals for the Seventh Circuit, said:

"Whether a cause of action survives by law, is not a question of procedure, but of right; and is determinable when the action is one arising at common law, not by the law of the state where the injuries were inflicted, but by the law of the state where the action is brought."

In that case Martin lived in Illinois and brought suit in that State against the Wabash Railway Company, a corporation of Ohio, to recover damages for personal injuries received [fol. 35] by him in Indiana. After judgment in the District Court and while the case was pending in the Circuit Court of Appeals, Martin died. The statute of Illinois provides that, "in addition to actions which survive by common law, the following actions also survive; action of replevin, action to recover damages for an injury to persons". Under the law of Indiana, the cause of action died with the plaintiff, just as in the case at bar, it died in New York with Ormsby, but the court held that whether or not the cause of action survived depended upon the law of Illinois where the action was brought, not upon that of Indiana, where it abated and so the action was maintained.

In Page v. United Fruit Co., 3 Fed. (2d) 747, one Michael R. Ryan, a citizen of Connecticut, was injured by the defendant, United Fruit Company in Costa Rica. Suit to recover damages was brought by Ryan in the district of Massachusetts. After verdict and while the case was pending in the Circuit Court of Appeals for the First Circuit, plaintiff died, and Page was substituted for him as plaintiff. It was contended on application for a rehearing that under the law of Costa Rica the cause of action did not survive and that the substituted plaintiff was improperly admitted to prosecute the cause. In reply to this contention, the Circuit Court of Appeals said:

"The right to revive the action is not affected by the fact that the plaintiff received his injuries in Costa Rica. The action having been brought in the Massachusetts district, the right to revive it is governed by the law of Massachusetts not by that of Costa Rica."

In the case of Martin's Administrator v. Baltimore & Ohio Railroad, 151 U. S. 673, the plaintiff brought suit against the Baltimore & Ohio Railroad Company in the State of West Virginia for injuries received by him in the State of Maryland. The suit was tried and a verdict was [fol. 36] rendered against Martin and for the defendant. The plaintiff appealed. Before the appeal was heard Martin died. In Maryland, a tort action does not abate with the death of the plaintiff. It survives for the benefit of his next of kin or personal representatives. But in the State of West Virginia, where the suit was brought, an action for personal injuries abates with the death of the person injured. The question at issue was whether or not Martin's administrator could maintain the action. This depended upon whether the survival of the cause of action was to be determined by the laws of Maryland or West Virginia. The court held that when the cause of action does not arise under a law of the United States, its survival depends upon the law of the state where the suit is brought and not upon the law of the state where the injury was received and so dismissed the writ of error. After citing and analyzing many cases it said:

"The result is, that by the law of Virginia the administrator has no right to maintain this action, and that by the statutes of the United States regulating the proceedings in this court he is not authorized to come in to prosecute this writ of error. The only verdict and judgment below were in favor of the defendant, who is not moving to have that judgment affirmed or set aside. The original plaintiff never recovered a verdict, judgment upon which might be entered or affirmed nunc pro tunc in his favor. If the judgment below against him should now, upon the application of his administrator, be reversed and the verdict set aside for error in the instructions to the jury, or, according to the old phrase, a venire de novo be awarded, no new trial could be had, because the action has abated by his death."

The court dismissed many cases on arrival at actions. The substance of the dismissals is fairly summed up in the syllabus as follows:

[Fol. 37] "The question, whether a cause of action survives to the personal representative of a deceased person, is a question not of procedure, but of right; and, when the cause of action does not arise under a law of the United States, depends upon the law of the State in which the suit is brought."

In Baltimore & Ohio Railroad Co. v. Jay, 173 U. S. 690, one John A. Harvey, a citizen of the State of Ohio, was injured at Alton, Indiana, in a collision caused by the negligence of the railroad company. He brought suit in the Common Pleas Court of Hancock County, Ohio, to recover damages for the personal injuries which he had thus received. The railroad company removed the case into the federal court. Thereafter Harvey died and the action was revived in the name of his Administrator, Jay, over the objection of the railroad company.

At the time of Harvey's death section 5111 of the Revised Statutes of Ohio provided that: "No action or proceeding pending in any court shall abate by the death of either or both of the parties thereto." On the other hand, the statute of Indiana provided that, "a cause of action arising out of an injury to the person, dies with the person of either party", with exceptions here immaterial. It was contended by the railroad company that the cause of action abated with the death of Harvey in accordance with the provision of the statute of Indiana which created the cause of action and defined the rights of the plaintiff.

The case eventually reached the Circuit Court of Appeals for the Sixth Circuit which certified the following question to the Supreme Court for its instruction:

"Does an action pending in the Circuit Court of the United States sitting in Ohio, brought by the injured person as plaintiff to recover damages for injuries sustained [fol. 38] by the negligence of the defendant in Indiana finally abate upon the death of the plaintiff in view of the fact that, had no suit been brought at all, the cause of action would have abated both in Indiana and Ohio, and that, even if suit had been brought in Indiana, the action would have abated in that State?"

The Court answered the question in the negative and held that the right to recover was of substantial value, attached under the local law of Ohio when suit was brought, was pending at the death of Harvey, became inseparably connected with the cause of action on the laws of Ohio were concerned and was not lost either upon the removal of the case into the federal court or the death of Harvey. It said:

"Whether a pending action may be revived upon the death of either party and proceed to judgment depends primarily upon the laws of the jurisdiction in which the action was commenced * * *; that the determination of the question of the right to revive this action in the name of Harvey's personal representative is not affected in any degree by the fact that the deceased received his injuries in the State of Indiana. The action for such injuries was transitory in its nature, and the jurisdiction of the Ohio court to take cognizance of it upon personal service or on the appearance of the defendant to the action cannot be doubted. Still less can it be doubted that the question of the revival of actions brought in the courts of Ohio for personal injuries is governed by the laws of that state, rather than by the law of the State in which the injuries occurred."

In this last case, the action survived because the legislature of Ohio had provided that it survived if it was "pending" at the time of the death of either party although it had abated in Indiana where the tort was committed. In the case at bar, the legislature of Pennsylvania has provided that an action survives the death of the tort feasor [fol. 39] and may be maintained against his executors, if it could have been maintained against him if he had lived. The test of a survival of an action depends upon whether or not it comes within the terms of the statute in the state where suit is brought. In the Jay case, supra, it was "pending" when Harvey died and was thus brought within the provisions of the statute, but in the case of Martin's Administrator v. Baltimore & Ohio Railroad, supra, it did not meet the requirements of the statute, for there was no statute providing for the survival of actions in West Virginia where the suit was brought and so the action abated with the death of Martin although it survived in Maryland

where the injuries were received. In the instant case, suit could have been brought against Ormsby if he had lived. Therefore, it may be maintained against his executors for it complies with the requirements prescribed by the legislature.

It follows that the judgment must be reversed and a venire facias de novo awarded.

A true copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 40] In United States Circuit Court of Appeals for the Third Circuit, March Term, 1933

No. 4864

Louise Chase, by Jesse Blythe, etc., and Louise Chase, in Her Own Right, Appellants,

vs.

Laura Ormsby et al., Exrs. Est. Frank G. Ormsby, Dec'd, Appellees

On Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Judgment—Filed April 7, 1933

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and a venire facias de novo awarded.

Philadelphia, April 7, 1933.

J. Warren Davis, Circuit Judge.

[File endorsement omitted.]

[fol. 41] Clerk's certificate to foregoing transcript omitted in printing.

Supreme Court of the United States

Order Allowing Certiorari—Filed October 9, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

No. 101

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1952. No.

LAURA ORMSBY AND B. RUSH FIELD, EXECUTORS OF THE ESTATE OF FRANK G. ORMSBY, DECEASED, PETITIONERS,

vs.

LOUISE CHASE, BY JESSE BLYTHE, PROCHEIN AMI, AND LOUISE CHASE, IN HER OWN RIGHT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ROBERT T. MCCRACKEN,
Attorney for Petitioner,
1421 Chestnut Street,
Philadelphia, Pennsylvania.

LAURENCE H. ELDREDGE,
C. BREWSTER RHOADS,
Of Counsel.

Lawyers' Brief Publishing Co., 4th Street Bldg., Philadelphia, Pa.

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Court of Appeals thereon is contrary to and in conflict with the decisions of this Court, other Federal courts, the settled weight of authority in the state courts, and the Restatement of Conflict of Laws.

2. The decision of the Circuit Court of Appeals that the question whether a tort action survives the tortfeasor's death is not one of substance, is contrary to and in conflict with the decisions of this Court and of the Circuit Court of Appeals for the Second Circuit.

3. The refusal of the Circuit Court of Appeals to recognize the petitioners' substantive defense under the applicable law of New York is contrary to and in conflict with the decisions of this Court and the weight of authority.

4. The decision of the Circuit Court of Appeals that the right of respondent to recover damages in this action and the validity of petitioners' defense thereto, are governed by the law of the forum and not the lex loci delicti, is contrary to and in conflict with decisions of the Circuit Courts of Appeals for the Second, Fourth, Sixth, Eighth and Ninth Circuits, and the Court of Appeals of the District of Columbia, and an earlier decision of the Circuit Court of Appeals for the Third Circuit.

Wherefore, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding the United States Circuit Court of Appeals for the Third Circuit to certify and to send to this Court a full and complete transcript of the Record and of all proceedings had in the case numbered and entitled on its docket No. 4864, March Term, 1932, Louise Chase by Jesse Blythe, Prochein Ami, and Louise Chase, in her own right, Plain-

tiff-Appellant v. Laura Ormsby and B. Rush Field, Executors of the Estate of Frank G. Ormsby, deceased, Defendants-Appellees, to the end that this cause may be reviewed and determined by this Honorable Court as provided for by the statutes of the United States; and that the judgment therein of said Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

LAURA ORMSBY,
B. RUSH FIELD,
Executors of the Estate of Frank G. Ormsby, deceased,
Petitioners,

By
ROBERT T. MCCRACKEN,
Attorney for Petitioners.

LAURENCE H. ELDREDGE,
C. BREWSTER RHOADS,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. OPINIONS OF COURTS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 10-13) was not officially reported. It was filed on September 24, 1931.

The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 17-24) has not yet been officially reported. It was filed on April 7, 1933.

II. JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (USCA, sec. 347).

2. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed is April 7, 1933 (R. 24).

3. The following cases sustain the jurisdiction of this Court:

Cuba R. R. Co. v. Crosby (1912), 222 U. S. 473;
Slater v. Mexican National R. R. Co. (1904), 194 U. S. 120;
Forsyth v. Hammond (1897), 166 U. S. 506, 513-514;
Spiller v. Atchison, Topeka & Santa Fe Rwy. (1920), 253 U. S. 117.

III. STATEMENT OF THE CASE.

This has already been stated under heading I in the petition, and said statement, in the interest of brevity, is hereby adopted and made a part of this brief.

IV. SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the United States District Court for the Eastern District of Pennsylvania, and in awarding a venire facias de novo.

2. The Circuit Court of Appeals for the Third Circuit erred in holding that the survival statute of the forum (Pennsylvania), governed the question whether the respondent's right of action survived the tortfeasor's death, and that the lex loci delicti (New York) did not.

3. The Circuit Court of Appeals for the Third Circuit erred in holding that the survival statute of the forum gave the respondent a right to maintain the present action although under the lex loci delicti no such right existed when suit was instituted.

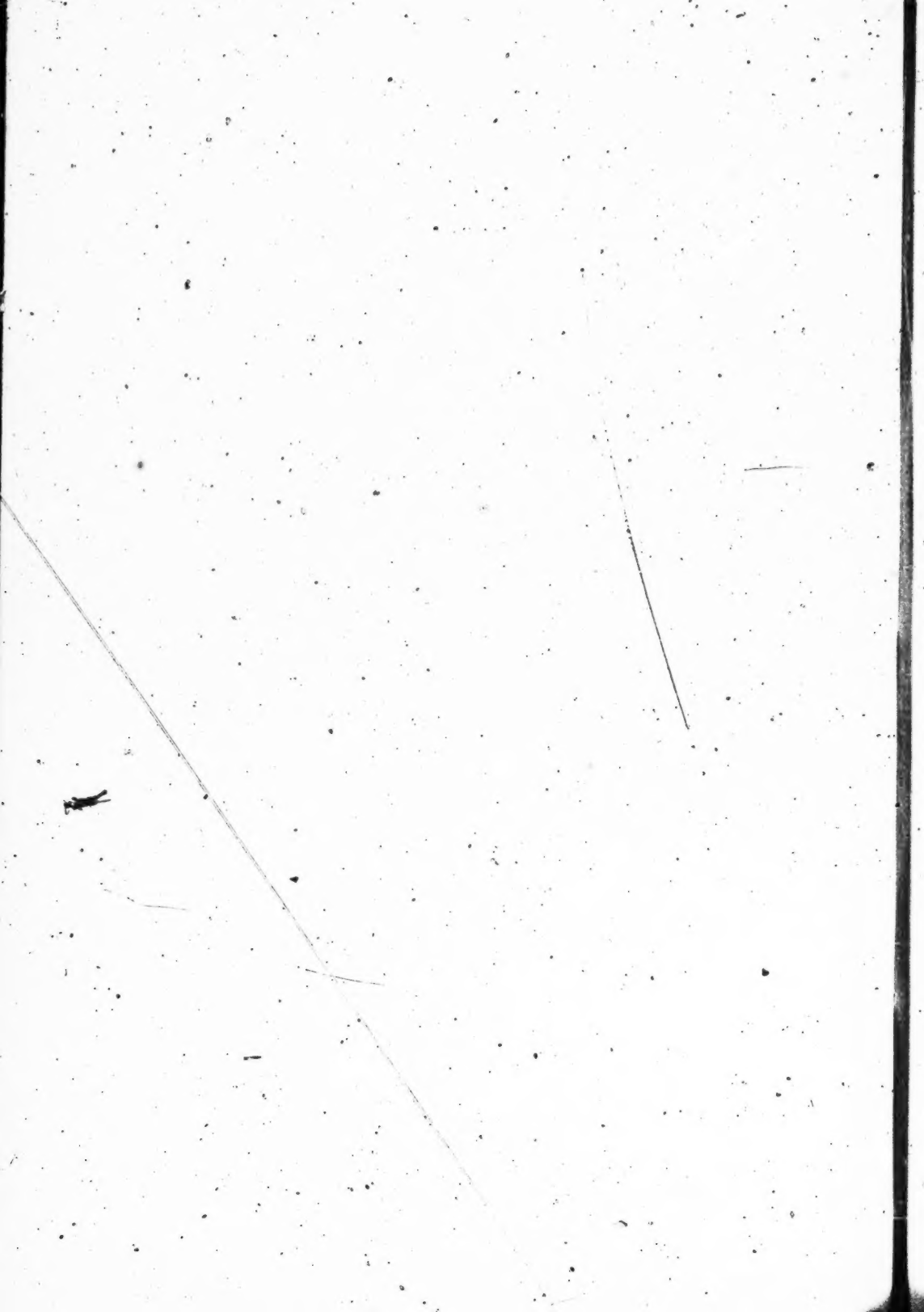
4. The Circuit Court of Appeals for the Third Circuit erred in not applying the principles clearly laid down in prior decisions of this Court as well as in its own decisions, and in the decisions of other Circuit Courts of Appeal.

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IN THE

Supreme Court of the United States

October Term, 1932 No.

LAURA ORMSBY AND B. RUSH FIELD, EXECUTORS OF THE ESTATE OF FRANK G. ORMSBY, DECEASED, PETITIONERS,

vs.

LOUISE CHASE, BY JESSE BLYTHE, PROCHEIN AMI, AND LOUISE CHASE, IN HER OWN RIGHT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of Laura Ormsby and B. Rush Field, Executors of the Estate of Frank G. Ormsby, deceased, respectfully shows to this Honorable Court:

I. SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an action in trespass to recover damages for personal injuries received by respondent in New York

City, New York, on October 17, 1925, when a passenger elevator in which she was riding crashed to the basement because of the alleged negligence of Frank G. Ormsby, the owner of the building (R. 2, 3, 8). On June 14, 1926, Ormsby died (R. 2, 9). The respondent did not institute any suit for damages during Ormsby's lifetime (R. 7). Under the law of New York, her cause of action abated with Ormsby's death (R. 10, 19). On April 12, 1927, the present action was instituted against the petitioners, as executors of Ormsby's estate, in the United States District Court for the Eastern District of Pennsylvania (R. 1). Under the statutory law of Pennsylvania an action for damages for personal injuries can be maintained against the estate of a deceased tortfeasor (R. 18, 19).

In their affidavit of defense, petitioners pleaded that respondent's cause of action had abated with Ormsby's death (R. 6, 7). The District Court held that the extent of respondent's rights was to be determined by the substantive law of New York, where the injuries were received, and entered a judgment of non suit for the reason that respondent had no cause of action under the law of New York at the time suit was instituted (R. 10-13, 16).

On appeal to the Circuit Court of Appeals for the Third Circuit, that court reversed the judgment and held that the question whether respondent's cause of action survived Ormsby's death was to be determined under the survival statute of Pennsylvania, in which State the suit was instituted (R. 17-24).

II. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. What law determines the survivability of a tort action for personal injuries is an important question of conflict of laws, and the decision of the Circuit

or the tortfeasor. *Actio personalis moritur cum persona.* Survival of such a right of action is dependent solely upon statute, and such statutes create a greater right than that known to the common law. It necessarily follows that the question of survivability is not one of procedure but is a matter of substance because it definitely bears upon the extent of the right of action given to the respondent under the law of New York. Indeed, in its opinion the Circuit Court of Appeals says: "All the authorities agree that survivability of a cause of action is * * * not a question of procedure." (R. 19). If survivability is not a question of procedure it must be a matter of substance, and this Court has so held.

In *Schreiber v. Sharpless* (1884), 110 U. S. 76, 80, this Court speaking by Chief Justice WAITE, said: "Whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it." In *Michigan Central R. R. v. Vreeland* (1913), 227 U. S. 59, 67, this Court speaking by Justice LURTON, said: "The question of survival is not one of procedure, 'but one which depends on the substance of the cause of action'."

The Circuit Court of Appeals for the Second Circuit has taken the same view: *Sullivan v. Associated Bill-Posters* (1925) 6 F. (2), 1000, 1008.

As the question of survivability is one of substance, if, like all other matters of substance, is determined by the lex loci delicti. The *Restatement of Conflict of Laws (Proposed Final Draft No. 3)*, provides:

> **"Section 426. SURVIVAL OF ACTIONS.**
>
> **Whether a claim for damages for a wrong survives the death of the wrongdoer or of the injured person is determined by the law of the place of wrong."**

Among the authorities in support of this statement

are: *Davis v. R. R.* (1887), 143 Mass. 301; *O'Reilly v. R. R.* (1889), 16 R. I. 388; *Needham v. Railway* (1865), 38 Vt. 294; *State v. R. R.* (1876), 45 Md. 41; *Hyde v. Railway* (1883), 61 Ia. 441. *Cf. Buckeye v. Buckeye* (1931), 203 Wis. 248.

The Restatement is also supported by *Orr v. Thorn* (1928), 107 Conn. 174, which on its facts is identical with the case at bar, and in which the court held that the plaintiff could not recover.

It is conceded that under the law of New York the respondent had no right of action after Ormsby's death (R. 19). Thus the question of survival involves the question of the extent of the right originally given to the respondent by the New York law. Cases involving actions under death statutes furnish pertinent analogies. The problem is to determine the extent of this new statutory right and it is universally held that the time fixed by such a statute within which suit must be instituted is a limitation on the extent of the right, and after the time limit expires there is no right of action and no suit can be maintained anywhere: *The Harrisburg* (1886) 119 U. S. 199, 214; *Wigan v. New York, &c. R. R.* (1931), 283 U. S. 53; *Goodrich on Conflict of Laws*, 170, 174.

The same view has been taken with regard to the Hepburn Amendment which creates a right to recover a freight overcharge provided a complaint is filed within two years from the time the cause of action accrues: *Phillips v. Grand Trunk Ry.* (1915), 236 U. S. 662.

In the case at bar the law of New York gave the respondent a right to recover damages from Ormsby during his lifetime. The "during his lifetime" was a limitation on the extent of the substantive right, just as the period of limitation in a death statute, and when Ormsby died the respondent's right of action was completely extinguished, and there was nothing left on which she could maintain an action anywhere. We submit that the decision

of the Circuit Court of Appeals to the contrary is bad law on an important question of conflict of laws, and is in conflict with the court's own statement that, "substantive rights are determined by the law of the place where the tort was committed * * *" (R. 18). The Circuit Court of Appeals does not cite one pertinent decision in support of its conclusion. The cases upon which it relies all deal with the separate problem of reviving a suit after the death of a party. In such case the forum will follow its own revival statute. When that situation is presented, inasmuch as the plaintiff did have an existing right of action when suit was first instituted, over which the forum assumed jurisdiction, the local procedure will be followed in raising that right of action to a judgment. The distinction between the two problems is discussed at length in *Orr v. Ahern* (1928), 107 Conn. 174, 176 178. The problem of what law governs revival of a pending action is quite different from the problem of what law governs the survival of a right of action on which no suit has been instituted.

We submit that inasmuch as the decision of the Circuit Court of Appeals is a binding authority on the district courts of Pennsylvania, New Jersey and Delaware and is likely to cause confusion in other Circuits in this field of law, it should not be permitted to stand unreversed by this Court.

POINT C.

The decision of the Circuit Court of Appeals that the lex loci delicti does not govern the question of respondent's right to maintain this action is in conflict with the decisions of this Court and of other Circuits.

The Circuit Court of Appeals held that whether the respondent's right of action survived Ormsby's death was to be determined under the survival statute of the forum and not by the law of New York where respondent was injured.

This is contra to and in conflict with the decision of the Sixth Circuit in *Sanders' v. Louisville & N. R. Co.* (1901), 111 Fed. 708, which was decided by then Judge Lurton. As stated in the syllabus the court held: "The question whether a cause of action created by a state statute survives the death of the plaintiff, or of the person for whose benefit it is given, is one of right, and not of procedure, and is governed by the statutes of the state giving such right of action."

It is also contra to and in conflict with the decision of the Second Circuit in *U. S. &c. v. Greenwald* (1927), 16 F. (2) 948, 950.

We submit that the decision of the Circuit Court of Appeals is also in conflict with the decisions of this Court, already referred to, which hold that survival is a question of substance and that all such questions must be determined by the lex loci.

Under the law of New York the respondent has no right of action and the petitioners are under no liability to her. In reversing the judgment of non suit the Circuit Court of Appeals is necessarily deciding that the law of New York does not and the law of the forum does govern the question of the respondent's right and the petitioners' liability. This is contrary to and in conflict with many decisions of this Court and other Circuits, including the following:

Heredia v. Davies (1926), 12 F. (2) 500, C. C. A. 4, holding that the right to maintain the action is governed by the lex loci.

The Hanna Nielsen (1921), 273 Fed. 171, cert. den. 257 U. S. 653, C. C. A. 2, holding that the lex loci governs the right to recover, and it must be proved.

Sullivan v. Nitrate &c. Co. (1919), 262 Fed. 371, C. C. A. 2, holding that the law of the forum does not determine the right to recover.

V. ARGUMENT.

Summary.

Point A. It is a settled principle of conflict of laws that all questions bearing upon the nature and extent of a plaintiff's right to recover damages for a tort are determined solely by the substantive law of the state in which it was created.

Point B. Whether a right of action survives the death of a tortfeasor is a question of substance involving the extent of the injured person's right, and dealing with the fundamental question whether such person has any right of action at all after such death.

Point C. The decision of the Circuit Court of Appeals that the lex loci delicti does not govern the question of respondent's right to maintain this action is in conflict with the decisions of this Court and of other Circuits.

POINT A.

It is a settled principle of conflict of laws that all questions bearing upon the nature and extent of a plaintiff's right to recover damages for a tort are determined solely by the substantive law of the state in which it was created.

In its opinion the Circuit Court of Appeals recognized the general principle that "substantive rights are determined by the law of the place where the tort was committed, the lex loci delicti * * *" (R. 18). The reason for this principle is that inasmuch as the right has been created by the lex loci, it is necessary to look to that law to understand the nature and extent of the right and the limitations upon it: *Dicey, Conflict of Laws* (4th Ed.) 10, 49-50; *Slater v. Mexican National R. R.* (1904), 194 U. S.

120; *Davis v. Mills* (1904), 194 U. S. 451, 454; *Spokane, &c. R. R. v. Whitley* (1915), 237 U. S. 487; *Western Union Telegraph Co. v. Brown* (1914), 234 U. S. 542.

The nature and extent of a common law right of action for personal injuries may be stated somewhat as follows: One who is himself free from contributory negligence and has not voluntarily assumed the risk is entitled to recovery, during the lifetime of both parties, damages for personal injuries proximately caused by the actor's wilful, reckless, or negligent misconduct. The requirements that the one injured be free from contributory negligence, from voluntary assumption of risk, and that the recovery be obtained during the lifetime of both the injured person and the tortfeasor, all deal with the substantive question of how extensive is the right which has been given and what limitations have been imposed upon it. All these questions are governed by the lex loci.

In *Slater v. Mexican National R. R.* (1904), 194 U. S. 120, 126, this Court, speaking by Mr. Justice Holmes, said:

> "But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, Smith v. Condry, 1 How. 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, **and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.** * * * Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught."

In *Davis v. Mills* (1904), 194 U. S. 451, 454, this Court again speaking by Mr. Justice Holmes, said:

> "But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates. Slater v. Mexican National Railroad, 194 U. S. 120."

In *Cuba R. R. Co. v. Crosby* (1912), 222 U. S. 473, 478 479, this Court, again speaking by Mr. Justice Holmes, said:

> "But when an action is brought upon a cause arising outside of the jurisdiction it always should be borne in mind that the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law. Slater v. Mexican National R. R. Co., 194 U. S. 120, 126. **The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there.** With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. American Banana Co. v. United Fruit Co., 213 U. S. 347, 356. See Bean v. Morris, 221 U. S. 485, 486, 487. That and that alone is the foundation of their rights. • • •
>
> We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. **The right to recover stands upon that as its necessary foundation.** It is part of the plaintiff's case, and if there is reason for doubt he must allege and prove it. The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold."

Therefore a plaintiff must show that at the moment of his coming into court he possesses a then existing right of action under the lex loci: *Dicey, Conflict of Laws* (4th Ed.), 22. All that the forum can do is to give extra-territorial jurisdiction to enforce an existing right of action. *Dicey*, supra, p. 10. If, when the plaintiff comes into court, he has no right of action under the lex loci, the forum cannot look to its own law to create a right of action for him. So firmly is this principle engrained that this court has recently held that the refusal of the forum to give effect to a substantive defense under the applicable law of another state subjects the defendant to irremediable damage, is reversible error, and where the defense arises under a statute, the refusal to recognize such defense is a violation of the full faith and credit clause of the Federal Constitution: *Bradford Electric Light Co. v. Clapper* (1932), 286 U. S. 145, 160.

Yet that is exactly what the Circuit Court of Appeals has done in the present case, only here the defense arises under the common law and not under a statute. We submit that the decision in this case is wholly in conflict with the whole theory of conflict of laws which is that the forum will, within certain limits, give a remedy to one who comes to it with an existing right of action, which has been created elsewhere, but that the forum cannot create a right of action for him.

POINT B.

Whether a right of action survives the death of a tort-feasor is a question of substance involving the extent of the injured person's right, and dealing with the fundamental question whether such person has any right of action at all after such death.

At common law a right of action for personal injuries ceases to exist upon the death of either the one injured

Rubenstein v. Williams (1932), 61 F. (2) 575, Ct. of A. D. C., holding that the right to recover is governed by the lex loci and not by the lex fori.

Mosby v. Manhattan (1931), 52 F. (2) 364, 368, cert. den. 284 U. S. 677; C. C. A. 8, holding that the lex loci governs all questions of defenses.

The Scotland (1881), 105 U. S. 24, 29, holding that the liabilities of the parties to an action are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. Accord: *Jarrett v. Wabash* (1932), 57 F. (2) 669, 671, cert. den., 287 U. S. 627, C. C. A. 2.

The Eagle Point (1906), 142 Fed. 453, cert. den., 201 U. S. 644, C. C. A. 3, holding that a rule which limits liability deals with substance and not with procedure.

Atchison, &c. Ruy. v. Spencer (1927), 20 F. (2) 714, C. C. A. 9, holding that the question of the effect of contributory negligence is governed by the lex loci. Accord: *Long v. R. R.* (1916), 238 Fed. 919, C. C. A. 4.

Wood v. Compagnie (1930), 43 F. (2), 941, 942, C. C. A. 2, saying that a limitation on a right of action is observed everywhere.

Bell v. Wabash (1932), 58 F. (2) 569, 572, C. C. A. 8, holding that a state statute cannot recreate a right given under a Federal statute that has ceased to exist by the very terms of the statute because the liability itself is destroyed.

None of the foregoing cases involve the identical factual situation presented in the case at bar. But they all deal with the extent of and the limitations on a plaintiff's right of action, and they all hold that such questions are governed by the lex loci. In the present case the New York law gave the respondent a right of action with the limitation that it must be asserted by suit and a recovery had during the lifetime of Ormsby. We submit, therefore, that the Circuit Court of Appeals in the case at bar in

holding that this limitation did not control but that the law of the forum determined the extent of and the limitations upon respondent's right of action, has held contra to and in conflict with the decisions of this Court and of the other Circuits whose decisions have been cited.

VI. CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the error of the Circuit Court of Appeals may be corrected and that to such an end a writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Third Circuit, and finally reverse it.

LAURENCE H. ELDREDGE,
C. BREWSTER RHOADS,
ROBERT T. MCCRACKEN,
Attorneys for Petitioners.

FILE COPY

SUPREME COURT OF THE UNITED STATES

October Term, 1951. No. 101.

LAURA GEMBEY AND A. JOHN FIELD, EXECUTORS OF THE ESTATE OF FRANK G. GEMBEY, DECEASED, PETITIONERS,

vs.

LOUISE CHASE, BY JESSE SLATER, PROCHEIN AMI, AND LOUISE CHASE, IN HER OWN RIGHT.

ADDITIONAL BRIEF ON BEHALF OF THE ALLOWANCE OF THE WRIT OF CERTIORARI AND SUPPLEMENTAL TO BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

[illegible]

Attorneys for Petitioners,
[illegible]
Philadelphia, Pennsylvania.

Lawrence H. Eldredge,
C. Brewster Rhoads,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1933. No. 101.

LAURA ORMSBY AND B. RUSH FIELD, EXECUTORS OF THE ESTATE OF FRANK G. ORMSBY, DECEASED, PETITIONERS,

vs.

LOUISE CHASE, BY JESSE BLYTHE, PROCHEIN AMI, AND LOUISE CHASE, IN HER OWN RIGHT.

ADDITIONAL REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT OF CERTIORARI AND SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR SAID WRIT.

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Laura Ormsby and B. Rush Field, Executors of the Estate of Frank G. Ormsby, deceased, petitioners above named, respectfully beg leave to submit the following additional reasons and brief in support of their petition for certiorari in this case (said petition having been duly docketed on May 26, 1933), for the reason that on May 22, 1933, and after the original petition for certiorari and

supporting brief were prepared, the Supreme Court of Pennsylvania handed down its decision in the yet unreported case of

Fred Sumner, et al. v. Edith M. Brown, Executrix of the Estate of Arthur R. Brown, etc., —— Pa. ——, —— A. ——.

ADDITIONAL REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

5. The decision of the Circuit Court of Appeals that the survival of a tort action is governed by the law of the forum, is contra to and in conflict with the law prevailing in the State courts of Pennsylvania, as announced in a subsequent decision of the Supreme Court of Pennsylvania.

6. The effect given to the Pennsylvania survival statute by the Circuit Court of Appeals, and its interpretation thereof, is contrary to and in conflict with the later decision of the Supreme Court of Pennsylvania.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

ARGUMENT.

Summary.

Point D. The decision of the Circuit Court of Appeals that the lex loci delicti does not govern the question of the survival of a cause of action for a tort is contrary to a subsequent decision of the Supreme Court of Pennsylvania.

Point A. Upon a factual situation where the Supreme Court of Pennsylvania has held that a cause of action for a tort does not survive the tortfeasor's death, the Circuit Court of Appeals has interpreted the Survival Statute of Pennsylvania as permitting the cause of action to survive.

POINT D.

The decision of the Circuit Court of Appeals that the lex loci delicti does not govern the question of the survival of a cause of action for a tort is contrary to a subsequent decision of the Supreme Court of Pennsylvania.

The decision of the Circuit Court of Appeals was handed down on April 7, 1933 (R. 24). Subsequent thereto, and on May 22, 1933, the Supreme Court of Pennsylvania handed down its decision in the yet unreported case of *Fred Sumner, et al. v. Edith M. Brown, Executrix of the Estate of Arthur R. Brown, etc.*, ——Pa. ——, —— A. ——.

We append hereto as Exhibit A a true copy of the opinion of that court. The decision is flatly contra to the decision in the case at bar. In the Sumner case, as in the case at bar, the plaintiff was injured in New York as a result of the tortfeasor's alleged negligence. The tortfeasor was killed in the accident, and thereafter his surviving partner died. Subsequent to this second death, suit was instituted in a Common Pleas court in Pennsylvania against the estate of the surviving partner of the original tortfeasor. A demurrer was filed to the statement of claim upon the ground that plaintiff had not averred that the law of New York provided for survival of the common law cause of action. The lower court entered a final judgment for the defendant on the demurrer, and this was affirmed on appeal by the Supreme Court.

We submit that this conflict between the decision of the Supreme Court of Pennsylvania and that of the Circuit Court of Appeals should not be permitted to stand. The question whether or not a cause of action survives is one in which the Federal courts should follow the law as laid down by the highest appellate court in the State. A defendant's liability should not be dependent upon so fortuitous a circumstance as whether the plaintiff can institute his suit in the United States District Court in Pennsylvania.

We submit that particularly in view of the decision of the Supreme Court of Pennsylvania, a writ of certiorari should be granted in the present case, in order that this Court may review and reverse the decision of the Third Circuit Court of Appeals, and thus bring the law into harmony with the law in Pennsylvania and the great weight of authority elsewhere.

POINT E.

Upon a factual situation where the Supreme Court of Pennsylvania has held that a cause of action for a tort does not survive the tortfeasor's death, the Circuit Court of Appeals has interpreted the Survival Statute of Pennsylvania as permitting the cause of action to survive.

In its opinion the Circuit Court of Appeals cites the Pennsylvania Survival Statute, which is the *Act of March 30, 1921, P. L. 55, Sec. 35 (b)*. (R. 19). The court said:

> "In the case at bar, the legislature of Pennsylvania has provided that an action survives the death of the torfeasor and may be maintained against his executors, if it could have been maintained against him if he had lived * * *. In the instant case, suit could have been brought against Ormsby if he had lived. Therefore, it may be maintained against his

executors for it complies with the requirements prescribed by the legislature." (R. 23-24)

The Circuit Court of Appeals, therefore, interpreted the Pennsylvania statute as giving the respondent injured in New York the right to maintain an action in Pennsylvania after the tortfeasor's death. We submit that this interpretation by the Circuit Court of Appeals of a local statute is contrary to the recent decision of the Supreme Court of Pennsylvania in Sumner v. Brown, supra. In the opinion of the Supreme Court of Pennsylvania, it nowhere refers to the Act of March 30, 1921, but its very silence upon that point is in effect a decision that the act does not apply where the plaintiff was injured in another jurisdiction; and that the act cannot be interpreted to give one injured in New York the right to maintain an action in Pennsylvania subsequent to the tortfeasor's death. Substantially, therefore, the decision of the Circuit Court of Appeals interprets a local statute in Pennsylvania to give a plaintiff rights which the Supreme Court of Pennsylvania subsequently held a plaintiff does not have, and the decision of the Circuit Court of Appeals upon the interpretation of a Pennsylvania statute, accordingly, is in conflict with and contrary to the decision of the Supreme Court of Pennsylvania upon the same matter. This Court has frequently assumed jurisdiction to review and reverse a decision of a Circuit Court of Appeals upon the interpretation of a state statute which is in conflict with the decision of the highest appellate court of that state: *Sioux County v. National Surety Company* (1928), 276 U. S. 238; *Hawks v. Hamill* (1933), 288 U. S. 52.

For this further reason, also, we submit that a writ of certiorari should be granted.

CONCLUSION.

It is therefore respectfully submitted that for these further reasons also this case is one calling for the exercise by this Court of its supervisory powers, in order that the error of the Circuit Court of Appeals may be corrected, and that to such an end a writ of certiorari should be granted, and this Court should review the decision of the Circuit Court of Appeals for the Third Circuit, and finally reverse it.

LAURENCE H. ELDRIDGE,
C. BREWSTER RHOADS,
ROBERT T. MCCRACKEN,
Attorneys for Petitioners.

EXHIBIT A.

IN THE
SUPPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT.

FRED SUMNER, FRANCES SUMNER, His Wife, *Appellants*, v. EDITH M. BROWN, EXECUTRIX OF THE ESTATE OF ARTHUR R. BROWN, SURVIVING PARTNER OF ARTHUR R. BROWN AND HARRY R. BROWN, CO-PARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME AND STYLE OF THE ATHENS MOTOR COMPANY.	No. 100. January Term, 1933. Appeal from the Judgment of the Court of Common Pleas of Bradford County to No. 161 May Term, 1932.

LINN, *J.*

This appeal is from the entry of judgment for the defendant on an affidavit of defense in the nature of a demurrer to an amended statement of claim. Plaintiff, a guest in an automobile driven by Harry R. Brown, was injured in the State of New York April 24, 1931, by reckless driving. Brown was killed in the resulting accident. At the time, he and Arthur R. Brown were partners in the business of selling automobiles and maintaining a garage in Athens, Pennsylvania. The disastrous journey

was in the ordinary course of the business of the partners. On September 8, 1931, Arthur R. Brown, died, testate. Letters testamentary were issued to his executrix by the Orphans' Court of Bradford County, Pennsylvania.

In March, 1932, to recover for personal injury, plaintiffs brought this action against "Edith M. Brown, Executrix of the estate of Arthur R. Brown, surviving partner of Arthur R. Brown and Harry R. Brown, copartners, trading and doing business under the firm name and style of the Athens Motor Company." Pursuant to section 20 of the Practice Act, the executrix objected that the statement of claim set forth no right of action either against Harry R. Brown or against Arthur R. Brown who died before suit was brought, or for which his estate was liable; that plaintiff had not averred (cf. Usher v. R. R. Co., 126 Pa. 206; 17 A. 596; Rosenzwieg v. Heller, 302 Pa. 279, 153 A. 346; Smith, Adm. v. Pennsylvania R. R. Co., 304 Pa. 294, 297, 156 A. 89) that the law of New York provided for survival against the decedent of liability for the common law cause of action: (Moe v. Smiley, 125 Pa. 136, 17 A. 228; Gorlitzer v. Wolffberg, 208 N. Y. 475.) Leave to amend the statement of claim followed. Plaintiff then amended by quoting (from the partnership statute of New York) the provisions that dissolution results by the death of a partner, that partnership continues until the winding up is completed, and that "Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his copartners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act." Plaintiff also averred that the affairs of this partnership had not been wound up. Defendant then renewed her former objection and, after

hearing, judgment for her was entered on the ground that no right of action against defendant was pleaded.

Unless the law of New York provided a right of action for the tort, none exists; without a right of action, the suit must fail; if a right exists, it must be pleaded: Usher v. West Jersey R. R. Co., 126 Pa. 206, 17 A. 596; LaBar v. N. Y. etc. R. R. Co., 218 Pa. 261, 67 A. 413. The provisions quoted from the partnership statute do not provide for the continuation of the common law liability for personal injury after death of the party liable. For the wrongful act of the partner who drove the car, the property of the partnership was answerable (in the words of the statute) "to the same extent as" he was; but his common law liability had been terminated with his death: Moo v. Smiley, supra. But as agent for his co-partner, his tort likewise made the property of the partnership answerable, but this liability also terminated by the death of the surviving partner. No right of action then remains.

Appellant attempts to meet that objection by contending that the partnership is a "legal entity", responsible (in the words of her brief) "after the individual liabilities of the partners may have been terminated by their deaths;" that the entity "continues until its affairs are wound up" and that, accordingly, it is answerable for this tort, although by the common law no recovery could be had against the estates of the joint and several tort feasors. She cites decisions prior to the partnership act holding, or containing statements, that a partnership is an artificial entity, and also refers to various sections of the Pennsylvania partnership statute, said to support the 'entity' theory. Passing the failure to aver in the statement of claim that such provisions are also the law of New York, it is sufficient, for present purposes, to say that it is well known that the act was drawn and enacted to give effect, as its terms indicate, to the common law or aggregate theory that partners are joint principals in

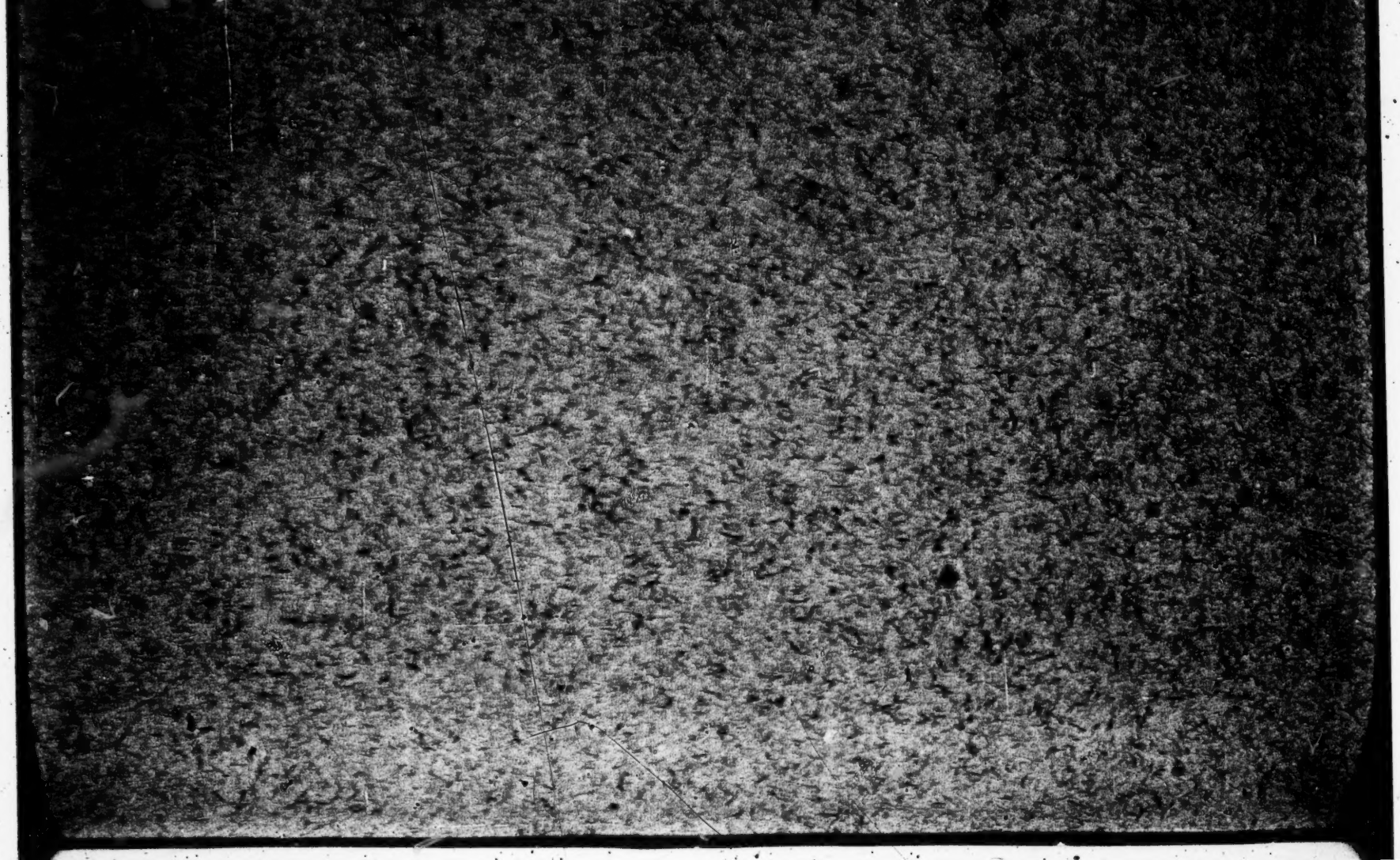
partnership transactions, holding property as tenants in partnership, and not to give effect to the theory that the partnership is a legal or fictitious person, which owns the property, and for whom the partners act as mere agents.*

From the section of the New York law, quoted above, appellant selects the declaration that "the partnership is liable therefor to the same extent as the partner so acting or omitting to act," and contends that the word 'partnership' designates a legal or fictitious person. The argument is then made hat this person remains answerable for the personal injury in question. But the term partnership, as there used, refers to the fact that persons have associated themselves "to carry on as co-owners a business for profit" (section 6); the use of the word was not intended to establish or recognize the creation of a legal person by the mere fact of association for the purpose stated in the partnership agreement.

As no cause of action is averred in the amended statement, the judgment is affirmed.

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*See The Uniform Partnership Act, A Criticism by Judson A. Crane, 28 Harv. Law Rev. 762. The Uniform Partnership Act. A Reply to Mr. Crane's Criticism, by William Draper Lewis, 29 Harv. Law Rev. 158.



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1913. No. 191.

LAURA ORMSBY AND D. B. RUSH FIELD, EXECUTORS OF THE ESTATE OF FRANK G. ORMSBY, DECEASED, *Petitioners*,

v.

LOUISE CHASE, BY JESSE BLYTHE, PROCHEIN AMI, AND LOUISE CHASE, IN HER OWN RIGHT.

BRIEF FOR PETITIONERS.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

LAURENCE H. ELDREDGE,
C. BREWSTER RHOADS,
ROBERT T. McCRACKEN,
Attorneys for Petitioners.
1421 CHESTNUT STREET,
PHILADELPHIA, PA.

MONTGOMERY & McCRACKEN,
Of Counsel.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA

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I. OPINIONS OF COURTS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania. (R. 10-13) is reported in 3 F. Supp. 680. It was filed on September 24, 1931.

The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 17-24) is reported in 65 F. (2d) 521. It was filed on April 7, 1933.

II. STATEMENT AS TO JURISDICTION.

1. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (USCA, sec. 347).

2. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed is April 7, 1933 (R. 24).

3. The following cases sustain the jurisdiction of this Court:

Cuba R. R. Co. v. *Crosby* (1912), 222 U. S. 473;

Slater v. *Mexican National R. R. Co.* (1904), 194 U. S. 120;

Forsyth v. *Hammond* (1897), 166 U. S. 506, 513-514;

Spiller v. *Atchison, Topeka & Santa Fe Rwy.* (1920), 253 U. S. 117.

III. STATEMENT OF THE CASE.

This is an action in trespass to recover damages for personal injuries received by respondent in New York City, New York, on October 17, 1925, when a passenger elevator in which she was riding crashed to the basement because of the alleged negligence of Frank G. Ormsby, the owner of the building and a resident of Pennsylvania (R. 2, 3, 8). On June 14, 1926, Ormsby died (R. 2, 9). The respondent did not institute any suit for damages during Ormsby's lifetime (R. 7). Under the law of New York, her cause of action abated with Ormsby's death (R. 10, 19). On April 12, 1927, the present action was instituted against the petitioners, as executors of Ormsby's estate, in the United States District Court for the Eastern District of Pennsylvania (R. 1). Under the statutory law of Pennsylvania an action for damages for personal injuries can be maintained against the estate of a deceased tortfeasor (R. 18, 19).

In their affidavit of defense, petitioners pleaded that respondent's cause of action had abated with Ormsby's death (R. 6, 7). The District Court held that the extent of respondent's rights was to be determined by the substantive law of New York, where the injuries were received, and entered a judgment of non-suit for the reason that respondent had no cause of action under the law of New York at the time suit was instituted (R. 10-13, 16).

On appeal to the Circuit Court of Appeals for the Third Circuit, that court reversed the judgment and

held that the question whether respondent's cause of action survived Opnsby's death was to be determined under the survival statute of Pennsylvania, in which State the suit was instituted (R. 17-24).

On October 9, 1933, this Court granted *certiorari* to review the decision of the Circuit Court of Appeals.

IV. SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals for the Third Circuit erred in reversing the judgment of the United States District Court for the Eastern District of Pennsylvania, and in awarding a *venire facias de novo*.

2. The Circuit Court of Appeals for the Third Circuit erred in holding that the survival statute of the forum (Pennsylvania), governed the question whether the respondent's right of action survived the tort feasor's death, and that the *lex loci delicti* (New York) did not.

3. The Circuit Court of Appeals for the Third Circuit erred in holding that the survival statute of the forum gave the respondent a right to maintain the present action although under the *lex loci delicti* no such right existed when suit was instituted.

4. The Circuit Court of Appeals for the Third Circuit erred in not applying the principles clearly laid down in prior decisions of this Court as well as in its own decisions, and in the decisions of other Circuit Courts of Appeal.

V. ARGUMENT.

Summary.

Point A. It is a settled principle of conflict of laws that all questions bearing upon the nature and extent of a plaintiff's right to recover damages for a tort are determined solely by the substantive law of the state in which it was created.

Point B. Whether a right of action survives the death of a tortfeasor is a question of substance involving the extent of the injured person's right, and dealing with the fundamental question whether such person has any right of action at all after such death.

Point C. The decision of the Circuit Court of Appeals that the *lex loci delicti* does not govern the question of respondent's right to maintain this action is in conflict with the decisions of this Court and of other Circuits.

Point D. The decision of the Circuit Court of Appeals that the *lex loci delicti* does not govern the question of the survival of a cause of action for a tort is contrary to a subsequent decision of the Supreme Court of Pennsylvania.

Point E. Upon a factual situation where the Supreme Court of Pennsylvania has held that a cause of action for a tort does not survive the tortfeasor's death, the Circuit Court of Appeals has interpreted the Survival Statute of Pennsylvania as permitting the cause of action to survive.

POINT A.

It is a settled principle of conflict of laws that all questions bearing upon the nature and extent of a plaintiff's right to recover damages for a tort are determined solely by the substantive law of the state in which it was created.

The respondent, injured in New York, seeks damages from the tortfeasor's estate, he having died before any action was brought. Under the law of New York the death extinguished the respondent's cause of action. The District Court held that the question of survival was one of substance to be determined by the *lex loci*, and entered a non-suit (R. 16-13, 16). The Circuit Court of Appeals while agreeing that "The general rule of law declared in both text books and decisions is that substantive rights are determined by the law of the place where the tort was committed, * * *" (R. 18); and that "All the authorities agree that survivability of a cause of action is * * * not a question of procedure" (R. 19); nevertheless went on to hold that "Whether or not a cause of action survives, is, therefore, determined by the laws of the state where the action is brought and not by the laws of the state in which the injury was inflicted" (R. 19), and reversed the judgment of non-suit.

There can be no doubt as to the soundness of the principle that "substantive rights are determined by the law of the place where the tort was committed, the *lex loci delicti* * * *" (R. 18). The reason

for this principle is that inasmuch as the right has been created by the *lex loci*, it is necessary to look to that law to understand the nature and extent of the right and the limitations upon it: *Dicey, Conflict of Laws* (4th Ed.) 10, 1950; *Slater* v. *Mexican National R. R.* (1904), 194 U. S. 120; *Davis* v. *Mills* (1904), 194 U. S. 451, 454; *Spokane, &c. R. R.* v. *Whitley* (1915), 237 U. S. 487; *Western Union Telegraph Co.* v. *Brown* (1914), 234 U. S. 542.

The nature and extent of a common law right of action for personal injuries may be stated somewhat as follows: One who is himself free from contributory negligence and has not voluntarily assumed the risk is entitled to recover, during the lifetime of both parties, damages for personal injuries proximately caused by the actor's wilful, reckless, or negligent misconduct. The requirements that the one injured be free from contributory negligence, from voluntary assumption of risk, and that the recovery be obtained during the lifetime of both the injured person and the tortfeasor, all deal with the substantive question of how extensive is the right which has been given and what limitations have been imposed upon it. All these questions are governed by the *lex loci*.

In *Slater* v. *Mexican National R. R.* (1904), 194 U. S. 120, 126, this Court, speaking by Mr. Justice Holmes, said:

> "But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obliga-

tion, Smith *v.* Condry, 1 How. 28, but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, **and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.** * * * Therefore we may lay on one side as quite inadmissible the notion that the law of the place of the act may be resorted to so far as to show that the act was a tort, and then may be abandoned, leaving the consequences to be determined according to the accident of the place where the defendant may happen to be caught."

In *Davis* v. *Mills* (1904), 194 U. S. 451, 454, this Court again speaking by Mr. Justice Holmes, said:

"But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates. Slater *v.* Mexican National Railroad, 194 U. S. 120."

In *Cuba R. R. Co.* v. *Crosby* (1912), 222 U. S. 473, 478-479, this Court, again speaking by Mr. Justice Holmes, said:

"But when an action is brought upon a cause arising outside of the jurisdiction it always should be borne in mind that the duty of the court is not to administer its notion of justice but to enforce an obligation that has been created by a different law. Slater *v.* Mexican National R. R. Co., 194 U. S. 120, 126. **The law of the forum is material only as setting a limit of policy beyond**

which such obligations will not be enforced there. With very rare exceptions the liabilities of parties to each other are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. American Banana Co. v. United Fruit Co., 213 U. S. 347, 356. See Bean v. Morris, 221 U. S. 485, 486, 487. That and that alone is the foundation of their rights. * * *

"We repeat that the only justification for allowing a party to recover when the cause of action arose in another civilized jurisdiction is a well founded belief that it was a cause of action in that place. **The right to recover stands upon that as its necessary foundation.** It is part of the plaintiff's case, and if there is reason for doubt he must allege and prove it. The extension of the hospitality of our courts to foreign suitors must not be made a cover for injustice to the defendants of whom they happen to be able to lay hold."

Therefore a plaintiff must show that at the moment of his coming into court he possesses a then existing right of action under the *lex loci: Dicey, Conflict of Laws* (4th Ed.), 22. All that the forum can do is to give extra-territorial jurisdiction to enforce an existing right of action. *Dicey*, supra, p. 10. If, when the plaintiff comes into court, he has no right of action under the *lex loci*, the forum cannot look to its own law to create a right of action for him. So firmly is this principle engrained that this Court has recently held that the refusal of the forum to

give effect to a substantive defense under the applicable law of another state subjects the defendant to irremediable damage, is reversible error, and where the defense arises under a statute, the refusal to recognize such defense is a violation of the full faith and credit clause of the Federal Constitution: *Bradford Electric Light Co.* v. *Clapper* (1932), 286 U. S. 145, 160. In that case Mr. Justice Brandeis said, at page 160:

> "But the Company is in a position different from that of a plaintiff who seeks to enforce a cause of action conferred by the laws of another State. The right which it claims should be given effect is set up by way of defense to an asserted liability; **and to a defense different considerations apply.** Compare Home Ins. Co. *v.* Dick, 281 U. S. 397, 407, 408, 74 L. ed. 926, 933, 934, 74 A. L. R. 701, 50 S. Ct. 338. A State may, on occasion, decline to enforce a foreign cause of action. In so doing, it merely denies a remedy, leaving unimpaired the plaintiff's substantive right, so that he is free to enforce it elsewhere. **But to refuse to give effect to a substantive defense under the applicable law of another State, as under the circumstances here presented, subjects the defendant to irremediable liability. This may not be done.**"

Yet that is exactly what the Circuit Court of Appeals has done in the present case, only here the defense arises under the common law and not under a statute. The petitioners have a complete and substantive defense under the law of New York inasmuch as under that law the respondent's cause of

action had ceased to exist before this suit was instituted. Despite this defense the Circuit Court of Appeals held that the petitioners are subject to liability. We submit that the decision in this case is completely in conflict with the whole theory of conflict of laws which is that the forum will, within certain limits, give a remedy to one who comes to it with an existing right of action, which has been created elsewhere, but that the forum cannot create a right of action for him.

POINT B.

Whether a right of action survives the death of a tortfeasor is a question of substance involving the extent of the injured person's right, and dealing with the fundamental question whether such person has any right of action at all after such death.

At common law a right of action for personal injuries ceases to exist upon the death of either the one injured or the tortfeasor. *Actio personalis moritur cum persona.* Survival of such a right of action is dependent solely upon statute, and such statutes create a greater right than that known to the common law. It necessarily follows that the question of survivability is not one of procedure but is a matter of substance because it definitely bears upon the extent of the right of action given to the respondent under the law of New York. Indeed, in its opinion the Circuit Court of Appeals says: "All the authorities agree that survivability of a cause of action is * * * not a question of pro-

cedure." (R. 19.) If survivability is not a question of procedure it must be a matter of substance, and this Court has so held.

In *Schreiber* v. *Sharpless* (1884), 110 U. S. 76, 80, this Court speaking by Chief Justice Waite, said: "Whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it." In *Michigan Central R. R.* v. *Vreeland* (1913), 227 U. S. 59, 67, this Court speaking by Justice Lurton, said: "The question of survival is not one of procedure, 'but one which depends on the substance of the cause of action.'"

The Circuit Court of Appeals for the Second Circuit has taken the same view: *Sullivan* v. *Associated Bill Posters* (1925), 6 F. (2), 1000, 1008.

As the question of survivability is one of substance, it, like all other matters of substance, is determined by the *lex loci delicti*. The *Restatement of Conflict of Laws (Proposed Final Draft No. 3)*, provides:

> **"Section 426. SURVIVAL OF ACTIONS.**
>
> **"Whether a claim for damages for a wrong survives the death of the wrongdoer or of the injured person is determined by the law of the place of wrong."**

Among the authorities in support of this statement are: *Sumner* v. *Brown* (1933), 312 Pa. 124; *Orr* v. *Ahern* (1928), 107 Conn. 174; *Davis* v. *R. R.* (1887), 143 Mass. 301; *O'Reilly* v. *R. R.* (1889), 16

R. I. 388; *Needham* v. *Railway* (1865), 38 Vt. 294; *State* v. *R. R.* (1876), 45 Md. 41; *Hyde* v. *Railway* (1883), 61 Ia. 441. *Cf. Buckeye* v. *Buckeye* (1931), 203 Wis. 248.

In *Sumner* v. *Brown* (1933), 312 Pa. 124, as in the case at bar, the plaintiff was injured in New York as a result of the tortfeasor's alleged negligence. The tortfeasor was killed in the accident, and thereafter his surviving partner died. Subsequent to this second death, suit was instituted in a Common Pleas court in Pennsylvania against the estate of the surviving partner of the original tortfeasor. A demurrer was filed to the statement of claim upon the ground that plaintiff had not averred that the law of New York provided for survival of the common law cause of action. The lower court entered a final judgment for the defendant on the demurrer, and this was affirmed on appeal by the Supreme Court. In his opinion Mr. Justice Linn said at page 127;

> "Unless the law of New York provided a right of action for the tort, none exists; without a right of action, the suit must fail; if a right exists, it must be pleaded: Usher v. West Jersey R. R. Co., 126 Pa. 206, 17 A. 596; LaBar v. N. Y. etc. R. R. Co., 218 Pa. 261, 67 A. 413. The provisions quoted from the partnership statute do not provide for the continuation of the common law liability for personal injury after death of the party liable. For the wrongful act of the partner who drove the car, the property of the partnership was answerable (in the words of the statute)

'to the same extent as' he was; but his common law liability had been terminated with his death: Moe *v.* Smiley, *supra*. But as agent for his co-partner, his tort likewise made the property of the partnership answerable, but this liability also terminated by the death of the surviving partner. **No right of action then remains.**"

In *Orr v. Ahern* (1928), 107 Conn. 174, there also arose the identical question presented in the case at bar. As in the case at bar, the plaintiff was injured in New York by the defendant's negligence. Before any action was commenced, the tort-feasor died. In Connecticut, as in Pennsylvania, the cause of action survived and could be maintained against the deceased person's executor or administrator. The plaintiff sued the administrator, just as in this case the respondent sued Ormsby's executors. In the lower court the defendant's demurrer to the complaint was sustained and judgment was entered for the defendant. On appeal, the judgment was affirmed. The opinion was written by the late Chief Justice Wheeler. In the opinion it is said at page 177:

> "The immediate question which we are called upon to decide is: Can a common-law action to recover damages for personal injuries suffered in New York be maintained in Connecticut against the personal representative of one whose negligence caused the injury, but who died before suit was brought?
>
> * * * * * * *

> "The argument of plaintiff's counsel centers upon their attempt to demonstrate that the question relates to the remedy and not to a substantive right, consequently the law of the forum governs, and whether the action survives is to be determined by that law. If the maintenance of this action depended merely upon the question of remedy, the result claimed must follow and the action survive, since the statute of the forum, Connecticut, so provides. The fallacy of this position is in its assumption that, under the common law of New York, the right of action for personal injuries was a substantive right existing wherever a like common-law right existed, which, though abated in the place of the wrong, would still exist in a foreign jurisdiction which had a survival statute and had obtained jurisdiction of the parties to the action after the abatement of the action in the State of origin. New York created the right of action for this wrong. The power which gave the right could take it away. **When, by its law, the death of the injuring person abated the right of action for this wrong, the right no longer existed in that jurisdiction, nor thereafter in any other jurisdiction.**"

The court further said at pages 180-181:

> "The right of action for plaintiff's injuries arose in New York and was extinguished at the death of the defendant's intestate, since there was no survival statute in existence there. Our own survival statute cannot revive the right of action which arose in New York and

had been extinguished, nor can it create a cause of action based upon a wrong occurring in the State of New York. It has no extra-territorial force."

In *Davis* v. *The New York, etc. R. R.* (1887), 143 Mass. 301, the plaintiff, as administrator, sued for a death negligently caused in Connecticut. By the the law of Massachusetts an action for personal injury survived to the administrator, and by the law of Connecticut it did not. The Court said at page 302:

> "The inquiry is therefore presented, whether a cause of action at common law, which dies with the person in the state where it accrued, not having been made there to survive by any statute, will survive under and by virtue of the statutes of survivorship of another state, so that, if jurisdiction is there obtained over the person or property of the defendant, judgment may properly be rendered against him or his property."

The court further said at page 306:

> "By the decease of the intestate, the cause of action at common law which she once had in Connecticut has there ceased to exist. It is for that state to determine what provision, * * * if any, shall be made in order to indemnify the estate of the intestate * * *. Our statute, permitting the survival of similar actions in this state, does not therefore apply.";

and again at page 303:

> "It must certainly be the right of each state to determine by its laws under what circumstances an injury to the person will afford a cause of action. If this is not so, a person who is not a citizen of the state, or who resorts to another state for his remedy, if the jurisdiction can be obtained, may subject the defendant in an action of tort to entirely different rules and liabilities from those which would control the controversy were it carried on where the injury occurred."

In *Needham v. Grand Trunk Railway* (1865), 38 Vt. 294, the decedent received injuries in New Hampshire and died three days thereafter. The plaintiff, as administrator of his estate, commenced an action pursuant to the statute in Vermont. The court held that no cause of action existed. The court said at pages 307-308:

> "It is conceded that the injury which caused the death of Needham was received, in the state of New Hampshire, consequently his cause of action accrued in that state. By the common law, the cause of action which accrued to the intestate in that state, is extinguished by his death. By the law of that state no right exists in the personal representative to recover for such injury, and if this action can be maintained under the provisions of the Act of 1847 or 1849, it must be upon the ground that our statutes have extra-territorial force. The fact that the intestate was a citizen of this state at the time of the injury is entirely

immaterial in the decision of this question. * * * Our statute **furnishes a remedy** where the cause of action accrued, without this state, **and is not discharged or extinguished, but still exists by the laws of the state where it accrued. * * * A cause of action, which by the rules of the common law is extinguished by the death of the party, is by such death fully discharged, unless the cause of action survives by force of some statute law of the state where the cause of action accrued.**"

The court said further at page 310:

"If the legislature of New Hampshire had survived the intestate's cause of action, then, doubtless, our statute would have given the plaintiff a remedy to enforce it. * * * In order to bring the intestate's cause of action within the provisions of the Act of 1847, we should be required to hold that our statute operates in New Hampshire so far that causes of action for bodily injury which accrue in that state, do not die with the injured person, but survive by force of our statute. If our statute had such operation and effect there, then it repeals the common law rule and renders it inoperative everywhere. But this cannot be the intent of our statute. **Its operation in respect to the right or cause of action,** is limited to matters **which occur within our own state.** All transactions occurring here, and liabilities for acts done here, are affected and governed by our local laws, but no such result follows transactions occurring in a different state or territory where those laws are entirely inoperative, and where **different rules** applicable to the subject may pre-

vail. We think it well settled that an action arising under a statute, and depending upon no common law rule, cannot be maintained where no such statute was in force, in the state or territory where the injury was inflicted."

In *Hyde* v. *Wabash, etc., Ry. Co.* (1883), 61 Iowa 441, an administrator brought an action, pursuant to an Iowa survival statute, for his testator's death, caused by injuries received in Missouri. The defendant demurred, on the ground that the declaration did not show what the Missouri law was, and the demurrer was sustained. The court said at page 443:

"The plaintiff contends that the question as to whether an action survives pertains to the remedy, and must be governed by the law of the place of the court. * * *

"But, in our opinion, there is a question involved deeper than one pertaining merely to the remedy. **Where a cause of action does not survive, it is to be treated the same as if it never arose.** The cause of action in this case arose, if anywhere, in Missouri, but, if it did not survive in Missouri and if the courts of that state would treat it as if it never arose, we think it would be improper for the courts of this state to treat it as if it did. An act which, done in Missouri, does not create a liability in that state, would not create a liability anywhere."

The same problem recently arose in Wisconsin upon a very different set of facts. In *Buckeye* v.

Buckeye (1931), 203 Wis. 248, the plaintiff was negligently injured by the defendant while in the state of Illinois. Thereafter suit to recover damages was started in Wisconsin. Sometime after the commencement of the action, but before trial, the plaintiff married the defendant. Both parties were domiciled in Wisconsin. By Illinois law the marriage extinguished the cause of action, but the Wisconsin law was otherwise. The Supreme Court of Wisconsin reversed the judgment for the plaintiff and dismissed the suit. In its opinion the court said at page 343:

> "If, as seems clear, the law of Illinois is to govern, both as to the creation and extent of defendant's liability, and if the liability so created is subject to discharge or modification by the law of Illinois, we see no escape from the conclusion that plaintiff's cause of action has been wholly extinguished by her marriage." * * *
>
> "It seems clear to us that, if plaintiff had prosecuted this suit in Illinois, she could not succeed. Her failure in the Illinois Courts **would not be grounded upon any rules peculiar to Illinois affecting remedy or procedure, but to the fact that her cause of action was completely extinguished. * * * We fail to see how her substantive rights can be any greater here than they would be in Illinois."**

In support of the position taken by the Court, it cited the case of *Slater* v. *R. R. Co.* (1904), 194 U. S. 120, which has already been considered in this brief.

It is conceded in the case at bar that under the law of New York the respondent had no right of action after Ormsby's death (R. 19). Thus the question of survival involves the question of the extent of the right originally given to the respondent by the New York law. Cases involving actions under death statutes furnish pertinent analogies. The problem is to determine the extent of this new statutory right and it is universally held that the time fixed by such a statute within which suit must be instituted is a limitation on the extent of the right, and after the time limit expires there is no right of action and no suit can be maintained anywhere: *The Harrisburg* (1886), 119 U. S. 199, 214; *Flynn* v. *New York, &c., R. R.* (1931), 283 U. S. 53; *Goodrich on Conflict of Laws*, 170, 171.

The same view has been taken with regard to the Hepburn Amendment which creates a right to recover a freight overcharge provided a complaint is filed within two years from the time the cause of action accrues: *Phillips* v. *Grand Trunk Ry.* (1915), 236 U. S. 662.

In the case at bar the law of New York gave the respondent a right to recover damages from Ormsby during his lifetime. The "during his lifetime" was a limitation on the extent of the substantive right, just as the period of limitation in a death statute, and when Ormsby died the respondent's right of action was completely extinguished, and there was nothing left on which she could maintain an action anywhere.

We submit that the decision of the Circuit Court of Appeals to the contrary is bad law on an important question of conflict of laws, and is in conflict with the Court's own statement that, "substantive rights are determined by the law of the place where the tort was committed. * * *" (R. 18); and with its further statement that "all the authorities agree that survivability of a cause of action is * * * not a question of procedure" (R. 19).

The Circuit Court of Appeals does not cite one pertinent decision in support of its decision. It relies upon four cases, each of which deals with the quite different question of reviving an existing law suit after the death of a party.

In *Baltimore and Ohio R. R.* v. *Jog* (1889), 173 U. S. 226, this Court held that the right to revive a pending suit upon the death of a party thereto was to be determined by the revival statutes of the forum and not by the law relative to revival in the jurisdiction where the cause of action arose. The same question was involved in the cases of

Martin v. *B. & O. R. R.* (1894), 151 U. S. 673; *Martin* v. *Wabash R. R.* (1905), 142 Fed. 650 (C. C. A. 7); and *Page* v. *United Fruit Co.* (1925), 3 F. (2d) 747 (C. C. A. 1), all of which cases are cited and relied upon by the Circuit Court of Appeals.

This Court has never intimated that these decisions are in any way in conflict with the view later expressed in *Slater* v. *R. R.* (1904), 194 U. S. 120, 126;

Davis v. *Mills* (1904), 194 U. S. 451, 454; and *Cuba R. R.* v. *Crosby* (1912), 222 U. S. 473, 478-79, upon which we relie. The Circuit Court of Appeals does not even refer to these later decisions, which govern the facts here presented.

We submit that the problem of revival is wholly distinct from the question of the survival of a cause of action. If a cause of action exists when a suit is instituted, there is at that time an existing right to compensation over which the court assumes jurisdiction. To use a simile, the plaintiff delivers into the hands of the forum a perfectly healthy, living child whose future will thereafter be determined by the forum. But where the cause of action has ceased to exist before any suit was brought, the forum can no more revivify the cause of action which has died with the decedent than it could raise the decedent himself from the dead.

This distinction was clearly perceived by the Connecticut Court in *Orr* v. *Ahern* (1928), 107 Conn. 174, and in discussing this difference, Chief Justice Wheeler said at page 176:

> "Had the plaintiff begun his action here before the death of the intestate, under this statute, after the death of the intestate, it would have been revived. When our court had assumed jurisdiction of a cause of action originating in New York, it was beyond the power of the State of its origin to destroy our jurisdiction of the action. The *locus delicti* determined the existence of the cause of action. The *locus fori* determined the remedy.

The place of the injury could not, by legislative or judicial action taken subsequent to our acquiring jurisdiction, take away our jurisdiction over the cause of action **which was good when we assumed it,** for that would give the place of the injury an extra-territorial right to control litigation here. Neither would the death of the defendant's intestate pending the action have deprived our court of the right, upon proper application, to have revived the action, since our statute gives our court that right.

"The decisions upon this point are in very substantial accord, resting upon the reason upon which the pending action for personal injuries rests. Baltimore & Ohio R. Co. *v.* Joy, 173 U. S. 226, 19 Sup. Ct. 387."

He then went on to say at page 178:

"A survival statute is supreme within the bounds of its own State; beyond these its power of operation is not only ineffective but nonexistent. A statute of revival operates differently. It does not revive a right of action which has ceased in its place of origin; it revives an action for a right which arose in a foreign jurisdiction, but while the right still existed in that jurisdiction the action to secure the right was begun in another forum. The right which the action thus sought to secure **became a right in the jurisdiction of the forum as soon as its courts had assumed jurisdiction of it.** No state could subsequently, by legislation or rule of law, destroy, control, or affect in slightest degree that right. **It then existed by force of the law of the forum."**

POINT C.

The decision of the Circuit Court of Appeals that the lex loci delicti does not govern the question of respondent's right to maintain this action is in conflict with the decisions of this Court and of other Circuits.

The Circuit Court of Appeals held that whether the respondent's right of action survived Ormsby's death was to be determined under the survival statute of the forum and not by the law of New York where respondent was injured. It said:

> "Whether or not a cause of action survives, is, therefore, determined by the laws of the state where the action is brought and not by the laws of the state in which the injury was inflicted" (R. 19).

It said again:

> "The test of a survival of an action depends upon whether or not it comes within the terms of the statute in the state where suit is brought" (R. 23).

This is contra to and in conflict with the decision of the Sixth Circuit in *Sanders'* v. *Louisville & N. R. Co.* (1901), 111 Fed. 708, which was decided by then Judge Lurton. As stated in the syllabus the court held: "The question whether a cause of action created by a state statute survives the death of the plaintiff, or of the person for whose benefit it is given, is one of right, and not of procedure, and is governed by the statutes of the state giving such right of action."

It is also contra to and in conflict with the decision of the Second Circuit in *U. S. &c.* v. *Greenwald* (1927), 16 F. (2) 948, 950.

We submit that the decision of the Circuit Court of Appeals is also in conflict with the decisions of this Court, already referred to, which hold that survival is a question of substance and that all such questions must be determined by the *lex loci.*

Under the law of New York the respondent has no right of action and the petitioners are under no liability to her. In reversing the judgment of nonsuit the Circuit Court of Appeals is necessarily deciding that the law of New York does not and the law of the forum does govern the question of the respondent's right and the petitioners' liability. This is contrary to and in conflict with many decisions of this Court and other Circuits, including the following:

Heredia v. *Davies* (1926), 12 F. (2) 500, C. C. A. 4, holding that the right to maintain the action is governed by the *lex loci.*

The Hanna Nielsen (1921), 273 Fed. 171, cert. den., 257 U. S. 653, C. C. A. 2, holding that the *lex loci* governs the right to recover, and it must be proved.

Sullivan v. *Nitrate &c. Co.* (1919), 262 Fed. 371, C. C. A. 2, holding that the law of the forum does not determine the right to recover.

Rubenstein v. *Williams* (1932), 61 F. (2) 575, Ct. of A. D. C., holding that the right to recover is governed by the *lex loci* and not by the *lex fori.*

Mosby v. *Manhattan* (1934), 52 F. (2) 364, 368, cert den., 284 U. S. 677, C. C. A. 8, holding that the *lex loci* governs all questions of defenses.

The Scotland (1884), 105 U. S. 24, 29, holding that the liabilities of the parties to an action are fixed by the law of the territorial jurisdiction within which the wrong is done and the parties are at the time of doing it. Accord: *Jarrett* v. *Wabash* (1932), 57 F. (2) 669, 671, cert. den., 287 U. S. 627, C. C. A. 2.

The Eagle Point (1906), 142 Fed. 453, cert den., 201 U. S. 644, C. C. A. 3, holding that a rule which limits liability deals with substance and not with procedure.

Atchison, &c. Ry. v. *Spencer* (1927), 20 F. (2) 714, C. C. A. 9, holding that the question of the effect of contributory negligence is governed by the *lex loci*. Accord: *Long* v. *R. R.* (1916), 238 Fed. 919, C. C. A. 4.

Wood v. *Compagnie* (1930), 43 F. (2) 941, 942, C. C. A. 2, saying that a limitation on a right of action is observed everywhere.

Bell v. *Wabash* (1932), 58 F. (2) 569, 572, C. C. A. 8, holding that a state statute cannot recreate a right, given under a Federal statute, that has ceased to exist by the very terms of the statute, because the liability itself is destroyed.

None of the foregoing cases involves the identical factual situation presented in the case at bar. But they all deal with the extent of and the limitations on a plaintiff's right of action, and they all hold that

such questions are governed by the *lex loci*. In the present case the New York law gave the respondent a right of action with the limitation that it must be asserted by suit and a recovery had during the lifetime of Ormsby. We submit, therefore, that the Circuit Court of Appeals in the case at bar in holding that this limitation did not control but that the law of the forum determined the extent of and the limitations upon respondent's right of action, has held contra to and in conflict with the decisions of this Court and of the other Circuits whose decisions have been cited.

POINT D.

The decision of the Circuit Court of Appeals that the lex loci delicti does not govern the question of the survival of a cause of action for a tort is contrary to a subsequent decision of the Supreme Court of Pennsylvania.

The decision of the Circuit Court of Appeals was handed down on April 7, 1933 (R. 24). Subsequent thereto, and on May 22, 1933, the Supreme Court of Pennsylvania handed down its decision in the case of *Sumner* v. *Brown, Executrix, etc.*, 312 Pa. 124, in which that court held that a suit to recover damages for injuries inflicted in New York could not be instituted in Pennsylvania after the death of the tort-feasor. The facts of that case are set forth on page 14 of this brief. That decision is squarely contra to the decision in the case at bar.

We submit that this conflict between the decision of the Supreme Court of Pennsylvania and that of the Circuit Court of Appeals should not be permitted to stand. The question whether or not a cause of action survives is one in which the Federal courts should follow the law as laid down by the highest appellate court in the State. A defendant's liability should not be dependent upon so fortuitous a circumstance as whether the plaintiff can institute his suit in the United States District Court in Pennsylvania.

We submit that for this reason alone this Court should reverse the decision of the Third Circuit Court of Appeals, and thus bring the law into harmony with the law in Pennsylvania and the great weight of authority elsewhere.

POINT E.

Upon a factual situation where the Supreme Court of Pennsylvania has held that a cause of action for a tort does not survive the tortfeasor's death, the Circuit Court of Appeals has interpreted the Survival Statute of Pennsylvania as permitting the cause of action to survive.

In its opinion the Circuit Court of Appeals cites the Pennsylvania Survival Statute, which is the *Act of June 7, 1917, P. L. 447, Section 35 (b)*, as amended by the *Act of March 30, 1921, P. L. 55; 20 P. S. §772* (R. 19). The Court said:

> "In the case at bar, the legislature of Pennsylvania has provided that an action survives the death of the tortfeasor and may be maintained

> against his executors, if it could have been maintained against him if he had lived * * *. In the instant case, suit could have been brought against Ormsby if he had lived. Therefore, it may be maintained against his executors for it complies with the requirements prescribed by the legislature" (R. 23-24).

The Circuit Court of Appeals, therefore, interpreted the Pennsylvania statute as giving the respondent injured in New York the right to maintain an action in Pennsylvania after the tortfeasor's death. We submit that this interpretation by the Circuit Court of Appeals of a local statute is contrary to the recent decision of the Supreme Court of Pennsylvania in *Sumner* v. *Brown* (1933); 312 Pa. 124. In the opinion of the Supreme Court of Pennsylvania, it nowhere refers to the Act of March 30, 1921, but its very silence upon that point is in effect a decision that the act does not apply where the plaintiff was injured in another jurisdiction; and that the act cannot be interpreted to give one injured in New York the right to maintain an action in Pennsylvania subsequent to the tortfeasor's death. Substantially, therefore, the decision of the Circuit Court of Appeals interprets a local statute in Pennsylvania to give a plaintiff the rights which the Supreme Court of Pennsylvania subsequently held a plaintiff does not have, and the decision of the Circuit Court of Appeals upon the interpretation of a Pennsylvania statute, accordingly, is in conflict with and contrary to the decision of the

Supreme Court of Pennsylvania upon the same matter. This Court has frequently assumed jurisdiction to review and reverse a decision of a Circuit Court of Appeals upon the interpretation of a state statute which is in conflict with the decision of the highest appellate court of that state: *Sioux County* v. *National Surety Company* (1928), 276 U. S. 238; *Hawks* v. *Hamill* (1933), 288 U. S. 52.

In the Sioux County case Mr. Justice Stone said at page 240:

> "The correctness of this interpretation of the Nebraska decisions is questioned here, but all doubts on that point have been set at rest by a later decision of the state court. In Scotts Bluff County *v.* First Nat. Bank, 115 Neb. 273, decided since the entry of judgment below, the Supreme Court of Nebraska held that the statute does not have the effect asserted, and that within the amount of the bond a county may recover from the surety the full amount of the deposit even though it exceed fifty per cent of the authorized capital of the depository.
>
> **"We accept this construction of the statute and accordingly set aside the conflicting interpretation of the court below, even though it antedated the determination by the state court."**

VI. CONCLUSION.

In view of the foregoing we respectfully submit that the decision of the Circuit Court of Appeals is contra to the decisions of this Court, of other Federal Courts, of the various State Courts including the Supreme Court of Pennsylvania, is contra to the Restatement of Conflict of Laws, and is opposed to and inconsistent with all established principles of conflict of laws.

Accordingly, the decision of the Circuit Court of Appeals should be reversed and the judgment of nonsuit which was entered by the District Court reinstated.

Respectfully submitted,

LAURENCE H. ELDREDGE,
C. BREWSTER RHOADS,
ROBERT T. MCCRACKEN,
Attorneys for Petitioners.

MONTGOMERY & MCCRACKEN,
Of Counsel.



FILE COPY

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1908. No. 191.

LAURA ORMSBY AND B. RUSH FIELD, EXECUTORS OF THE ESTATE OF FRANK J. ORMSBY, DECEASED, *Petitioners*,

v.

LOUISE CHASE, BY JESSE BLYTHE, PROCHEIN AMI, AND LOUISE CHASE, IN HER OWN RIGHT.

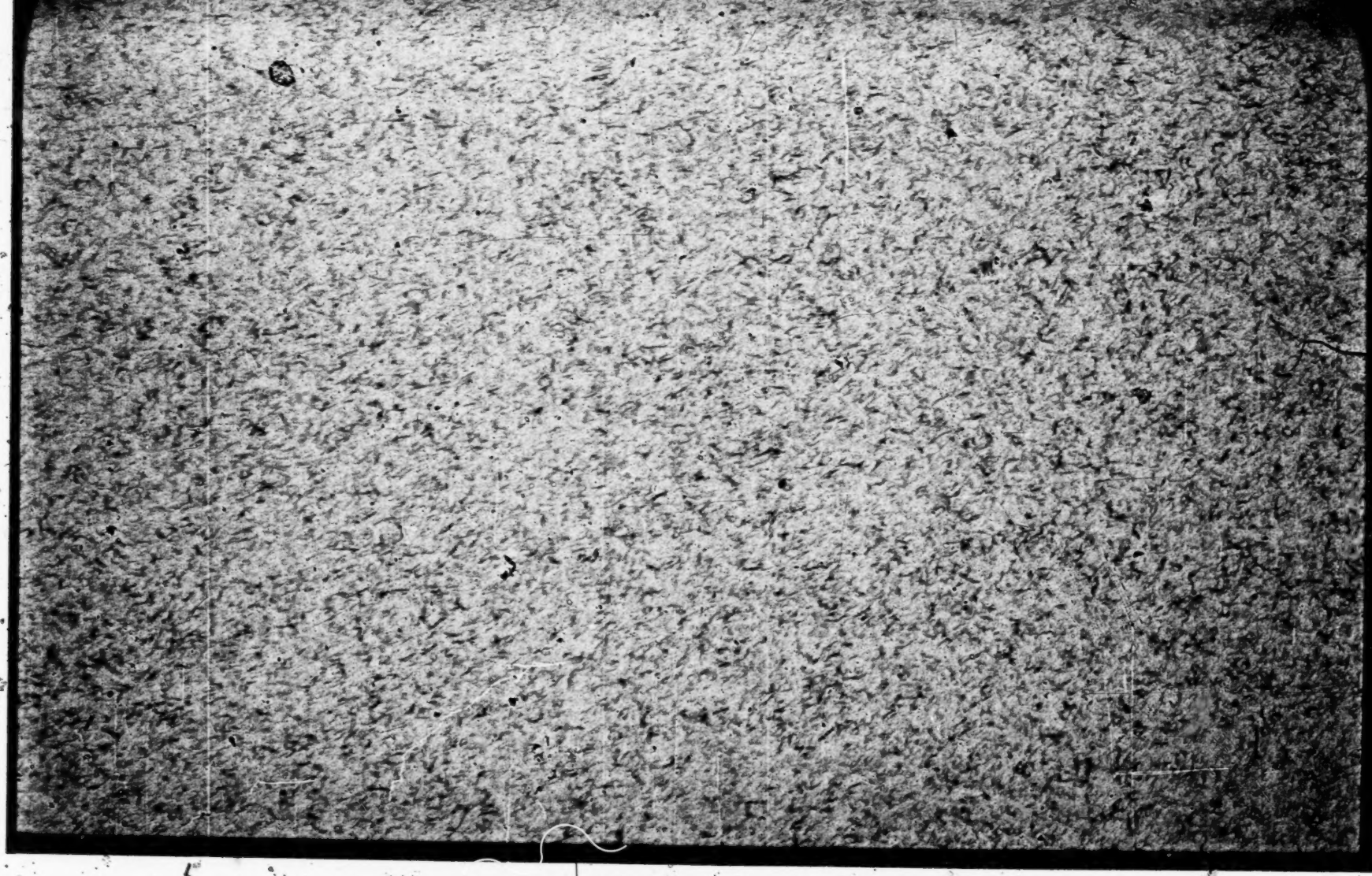
REPLY BRIEF FOR PETITIONERS.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

LAURENCE H. ELDREDGE,
C. BREWSTER RHOADS,
ROBERT T. McCRACKEN,
Attorneys for Petitioners,
1421 CHESTNUT STREET,
PHILADELPHIA, PA.

MONTGOMERY & McCRACKEN,
Of Counsel.

KING, LAIRD & SCOTT, PRS., PHILADELPHIA.



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REPLY BRIEF FOR PETITIONERS.

I. The Petitioners Properly Raised the Substantive Defense that Respondent's Cause of Action Abated with the Tortfeasor's Death.

Counsel for the respondent devote sixteen pages of their brief to arguing that the defense here presented is in the nature of a dilatory plea to the jurisdiction of the district court and that such defense has been waived by petitioners' failure to raise it in the manner prescribed by *Section 20* of the *Pennsylvania Practice Act of 1915, P. L. 483; 12 PS §471;* or by the *Pennsylvania Act of March 5, 1925, P. L. 23; 12 PS §672-675.*

The same argument was made unsuccessfully in both the district court and in the circuit court of appeals. We submit that that question is not before this Court and that such argument is, in any event, untenable. The question of waiver is only important where a valid cause of action exists and a defendant seeks to raise some technical or formal objection to the manner in which an action has been instituted. Where, however, there is no cause of action, it is difficult to see how a defendant's failure to make a particular objection in a particular way, can create a right of action which did not theretofore exist.

We submit that the fallacy of this part of the argument for the respondent is in the premise that the

defense set up by the petitioners is in the nature of a dilatory plea, a plea in abatement, and that such a plea cannot be raised in an affidavit of defense, but must be raised by a statutory demurrer, under *Section 20* of the *Pennsylvania Practice Act of 1915 (P. L. 483)*. However, Section 20 of the Practice Act merely provides that the defendant "**may** raise any question of law, without answering the averments of fact in the statement of claim * * *." It does not provide that the defendant **must** raise a question of law in this manner. Furthermore, *Section 3* of the *Practice Act* expressly provides: "Pleas in abatement * * * and all other pleas are abolished. Defenses heretofore raised by these pleas shall be made in the affidavit of defense." The defense in the present case was duly and properly raised in the affidavit of defense.

The allegation that the respondent's cause of action, if any she had, abated with the tortfeasor's death, can under no theory of common law pleading be deemed a plea in abatement. It is definitely a plea in bar which sets up a complete defense to this action and to any other action to recover for the injuries here sued for, which the appellant may institute in any court at any time. In

Stephen on Pleading (1867), 9th Am. Ed.,

the writer says, at page 46:

> "*Pleas* are divided into pleas DILATORY and PEREMPTORY; and this is the most general division to which they are subject.

"Subordinate to this is another division. Pleas are either *to the jurisdiction of the Court—in suspension of the action—in abatement of the writ of declaration—or in bar of the action;* the three first of which belong to the DILATORY class, the last is of the PEREMPTORY kind."

He said further, at page 49:

"The effect of all pleas in abatement, if successful, is, that the particular action is defeated. But, on the other hand, the right of suit itself is not gone; and the plaintiff, on resorting to a better form of writ or declaration, may maintain a new action, if the objection were founded on the frame or tenor of those instruments; or if the objection were to the ability of the party * * * a new action may be brought when that disability is removed."

With reference to pleas in bar, the same author says at page 51:

"A *plea in bar of the action* may be defined as one which shows some ground for barring or defeating the action. A plea in bar is, therefore, distinguished from all pleas of the dilatory class, **as impugning the right of action altogether,** instead of merely tending to divert the proceedings to another jurisdiction, or suspend them, or abate the particular writ or declaration. It is, in short, a substantial and conclusive answer to the action."

In

McKelvey on Common Law Pleading (1917), (2d Ed.),

the author says at page 95:

"§130. Dilatory pleas may be divided into three general classes, in respect to the effect which they have upon the disposition of the action: (1) Pleas to the jurisdiction of the court. (2) Pleas in suspension of the action. (3) Pleas in abatement.

"§131. (1) The plea to the jurisdiction of the court was in substance a statement that the plaintiff had commenced his action in the wrong court, either because the court had no jurisdiction of the subject-matter of the action or of the parties thereto, and that on that account the defendant ought not to be compelled to plead. A judgment for the defendant upon a plea to the jurisdiction was a virtual ending of the suit, as far as the particular court in which it was brought was concerned.

"§132. (2) The plea in suspension was a plea which showed matter, such as the excommunication or outlawry of the plaintiff, by reason of which he was not entitled to prosecute the action at the time. A judgment for the defendant upon such a plea amounted practically to an adjournment of the case indefinitely. In the language of the time, it was that he 'go quit without day,' but the action was not abated, and upon an ending of the disability by pardon, the plaintiff could proceed with the action.

"§133. (3) The term *plea in abatement* has

been quite generally used as synonymous with the term *dilatory plea.* This use of the term is inaccurate, as there is a very substantial difference between the *plea in abatement* and the other dilatory pleas. While the *plea to the jurisdiction,* if successful, disposes of the case entirely as far as the particular court is concerned, and the *plea in suspension* merely suspends the progress of the suit temporarily, the *plea in abatement* occupies a middle ground between the two. Its effect, if successful, is to dispose of the particular suit, but the plaintiff may commence anew upon the same cause of action in the same court, only being careful to avoid the mistake which caused the abating of his former suit."

He says further, at page 98:

"Judgment upon the dilatory plea was not final, as in the case of judgment upon a demurrer; it did not determine the case upon the merits. Mention has already been made of the fact that the plaintiff could, upon judgment against him upon a dilatory plea, either begin the action again in another court, proceed with it in the same court at a later date, or begin anew in the same court."

Mr. McKelvey then goes on to point out that there are two classes of pleas in bar, (1) pleas by way of confession and avoidance; and (2) pleas by way of traverse. He then says at page 105:

"§148. Pleas by way of confession and avoidance are of two kinds:

"(1) Pleas in discharge.

"(2) Pleas in excuse.

"The distinction between the two kinds is expressed in their names.

"Section 1.—Pleas in Discharge.

"§149. A plea in discharge is one which not only admits the facts stated in the declaration to be true, but also that the plaintiff at one time had a good cause of action against the defendant upon such facts, **and then alleges new matter which shows that the cause of action no longer exists.** This new matter is called matter in discharge."

In view of this analysis of different kinds of pleas, we submit that the defense in the case at bar can in no wise be deemed a dilatory plea. The determination of the case upon the defense here raised is a final determination upon the merits. The respondent cannot commence another suit in the court from which this appeal was taken, or in any other court. We submit that the defense here raised is, under common law pleading, that particular plea in bar which is known as a plea in discharge, inasmuch as it "alleges new matter which shows that the cause of action no longer exists."

It is equally clear that the *Act of 1925, P. L. 23* is wholly inapplicable to the case at bar. The title of that Act sets forth that it is

"An Act.

In relation to the procedure in certain classes of cases in which there is raised *a question as to the jurisdiction* of a court of first instance over the defendant or the cause of action for which

suit is brought; and authorizing appeals from the preliminary decision of such questions."

The purpose and scope of this Act have been repeatedly determined by the Supreme Court of Pennsylvania, and that court has uniformly held that the statute only relates to purely jurisdictional questions. In *Wilson* v. *Garland* (1926), 287 Pa. 291, 293, after citing the *Act of March 5, 1925, P. L. 23,* the court said *per curiam:*

> "That act provides for a preliminary determination of **questions of jurisdiction** in courts of first instance, for an appeal from the judgment entered on such questions, if the appeal is taken within fifteen days, and for advancement of such cases on the lists of the appellate courts. Appearance of defendant to object **to the jurisdiction** under this act is de bene esse only. **As may readily be seen, the purpose of the statute is to afford a speedy means of securing a final determination of jurisdictional matters in limine, before inquiry into the merits of the case.**"

In *Lackawanna County* v. *James* (1929), 296 Pa. 225, 227, Mr. Justice SIMPSON said:

> "It will be observed that the statute applies only where there is a 'question of jurisdiction over the defendant, or of the cause of action for which suit is brought.' Here, defendants have been duly served, hence there is jurisdiction over them; and the causes of action are assumpsit on surety bonds, over which causes the court below had jurisdiction. The purpose of the statute is to enable a defendant to have de-

termined, preliminarily, whether he is required to answer to the action, instead of having to wait until after he has incurred the delay and expense of a trial and appeal, only to find out, at the end of the litigation, that the case should not have been heard on the merits at all. **It was not intended to furnish a short cut to a determination of the issues of law or fact, raised by the pleadings, however certain their ultimate determination may apear to be.**"

In *Lewis* v. *Beatty* (1932), 306 Pa. 242, 244, the court said:

"The appeal is without merit. The court has jurisdiction over the defendant as he was personally served and no question is raised as to the regularity thereof. It is equally clear that the court of common pleas where the suit was brought has jurisdiction over the cause of action, to wit, slander. **Having jurisdiction over both the defendant and the cause of action the petition could not be granted.** * * * The above cited Act of 1925 confines the right of such preliminary appeal to the question of jurisdiction and it cannot be made a substitute for a general appeal. As to the other questions sought to be raised here the appeal is premature. Neither the sufficiency of the pleadings **nor any other questions suggested as an answer to plaintiff's claim, aside from jurisdiction,** can be considered on appeal under the Act of 1925. We have often so held."

Other decisions to the same effect include: *Clark* v. *Elkin* (1925), 283 Pa. 339; *Conerty* v. *Butler Co. Oil Ref. Co.* (1930), 301 Pa. 201, 202;

Fidelity-Philadelphia Tr. Co. v. *Berkin* (1930), 299 Pa. 196, 197; *Gilbert* v. *Lebanon Valley St. Ry. Co.* (1931), 303 Pa. 213, 217; *Gray* v. *Camac* (1931), 304 Pa. 74, 76; *Polakoff* v. *Marchand* (1926), 287 Pa. 28, 30; *Rutherford Water Co.* v. *Harrisburg* (1929), 297 Pa. 33, 36; *Skelton* v. *Lower Merion Twp.* (1930), 298 Pa. 471, 473; *Speckter v. North British & Mer. Ins. Co.* (1928), 293 Pa. 232, 236; *Staryen* v. *Midouhas* (1930), 299 Pa. 352, 353; *Wettengel* v. *Robinson* (1927), 288 Pa. 362, 367.

We submit that the foregoing decisions establish that the *Act of 1925* is completely inapplicable to the present case. The district court undoubtedly had jurisdiction over the petitioners personally. The writ of summons was duly served on April 25, 1927, upon each of the petitioners. There is no question that the service was irregular or improper in any way. So also, it cannot be disputed that the United States District Court has jurisdiction to hear and determine an action of trespass to recover damages for injuries negligently inflicted. The petitioners have not sought to raise any question of jurisdiction. While fully recognizing the jurisdiction of the court below over the subject matter of this suit and over the persons of the petitioners, they take the position that the respondent has no cause of action against them. This problem has nothing to do with the question of jurisdiction.

In the present case, no cause of action existed when the respondent instituted the present suit.

Whatever cause of action once existed had come to a complete end with the death of the tortfeasor. The affidavit of defense sets forth the non-existence of any cause of action as a complete bar to the appellants' claim. This plea amounts to a plea in bar and under the specific provision of Section 3 of the *Pennsylvania Practice Act of 1915, P. L. 483,* was properly raised in the affidavit of defense.

II. The Law of New York.

On page 23 of respondent's brief, counsel quoted the statement on page 22 of our principal brief that "It is conceded in the case at bar that under the law of New York the respondent had no right of action after Ormsby's death." Counsel for the respondent then go on to say:

"We do not make any such concession."

We are at a loss to understand what counsel can mean by this statement, but if it is meant to imply that an action does not abate with the death of a party under the law of New York, such implication is grossly inaccurate. The whole issue in this case arose only because the New York law is as we stated it. Up to the present time all the courts which have had this case before them have assumed, without dissent from counsel for the respondent, that the New York law is as we stated it in our principal brief.

In the district court Judge Dickinson said:

"By the laws of that State (New York) the common law maxim is followed that the right

of recovery for personal torts dies with the person of the tort-feasor * * *." (R. 10.)

In the circuit court of Appeals Judge Davis said:

"In New York, the death of Ormsby abated the action, * * *." (R. 19.)

On page 2 of the petition for writ of certiorari it is stated as a fact that under the law of New York respondent's cause of action abated with Ormsby's death. This averment is nowhere controverted in the respondent's answer.

As far as the New York authorities are concerned they are letter clear in holding that the respondent had no right of action after Ormsby's death: *Section 120, Decedent Estate Law of New York; McDonnell* v. *Gerken* (1922), 234 N. Y. 623; *Gorlitzer* v. *Wolffberg* (1913), 208 N. Y. 475; *Hegerich* v. *Keddie* (1885), 99 N. Y. 258—leading case; *Bernstein* v. *Queens County Jockey Club, et al.* (1927), 222 App. Div. 191; *Clough* v. *Gardiner* (1920), 111 N. Y. Misc. 244, Aff. (1920), 194 App. Div. 923.

Furthermore, as is shown by many of the cases (including *Sumner* v. *Brown* (1933), 312 Pa. 124), cited in our principal brief, the burden of pleading and proving that a cause of action does survive is on the respondent. Neither the Statement of Claim (R. 2-4) nor the respondent's offer of proof (R. 14-16) contain one word to show that the New York law is other than as we have stated it. If such were indeed the fact we would not be here now.

III. Conclusion.

We therefore submit that the decision of the Circuit Court of Appeals should be reversed and the judgment of non-suit, which was entered by the District Court, reinstated.

Respectfully submitted,

LAURENCE H. ELDREDGE,
C. BREWSTER RHOADS,
ROBERT T. MCCRACKEN,
Attorneys for Petitioners.

MONTGOMERY & MCCRACKEN,
Of Counsel.

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No. 101

IN THE

Supreme Court of the United States

No. OCTOBER TERM, 1932

Laura Ormsby and B. Rush Field, Executors of the Estate of Frank G. Ormsby, Deceased,

Petitioners

vs.

Louise Chase, By Jesse Blythe, Prochein Ami and Louise Chase in Her Own Right,

Respondents

BRIEF FOR RESPONDENT-APPELLEE

Edw. J. Fox ~~and Fox,~~
Attorneys for Respondent-Appellee

Easton Trust Building,
Easton, Penna.

Murrelle Printing Company, Paper Book Specialists, Sayre, Pa.

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Summary Statement of Matter Involved 1

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1932. No.

LAURA ORMSBY AND B. RUSH FIELD, EXECUTORS OF THE ESTATE OF FRANK G. ORMSBY, DECEASED,
Petitioners

vs.

LOUISE CHASE, BY JESSE BLYTHE, PROCHEIN AMI, AND LOUISE CHASE IN HER OWN RIGHT

To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Louise Chase, the plaintiff below, in answer to the petition of the executors of the Estate of Frank G. Ormsby, deceased, respectfully shows to this Honorable Court:

1. SUMMARY STATEMENT OF THE MATTER INVOLVED

This action was brought to recover damage for the personal injury received by the respondent in the City of New York in 1925, when a passenger in an elevator which fell from the fifth floor to the basement in a building owned by Frank G. Ormsby.

The allegation was that the owner of the building was grossly negligent. By reason of the character of the injury and the fact that the plaintiff was in a hospital for almost two years, no suit was brought for damages until April, 1927. In the meantime Ormsby died. Ormsby was domiciled in the City of Easton, Pennsylvania, and his executors were appointed by the Orphans' Court of Northampton County, Pennsylvania. The action being transitory in character could be brought either in New York or Pennsylvania and under the statutory law of Pennsylvania an action for damages for personal injury can be maintained against the estate of the tortfeasor.

An affidavit of Defense was filed by the Executors of Ormsby which was an affidavit upon the merits of the case. This affidavit was filed on May 2nd, 1927, and the case was placed on the trial list October 23rd, 1928, and was on two subsequent lists. The Affidavit of Defense also raised the question of the law as to the right to maintain the action because under the law of New York the action did not survive. Counsel for Plaintiff and Defendant filed a stipulation at the suggestion of the Judge of the lower Court in order that this preliminary question might be disposed of. The District Court held that the question could not be properly decided under that stipulation and directed that the case be placed on the trial list. When the case was called for trial

plaintiff was required to make an offer of proof. The offer was objected to and the objection sustained and the Court entered a compulsory non-suit which it refused to take off. Plaintiff took the position that the filing of an Affidavit of Defense on the merits without having filed a Statutory Demurrer was a waiver of any such question by the Defendant. The Court did not discuss this proposition but rested its decision entirely upon the view that under the law of New York no right of action exists.

The Circuit Court of Appeals reversed the Trial Judge on this point but did not discuss the question of the waiver.

II. REASONS WHY THE WRIT OF CERTIORARI SHOULD NOT BE ALLOWED

1. The decision of the Circuit Court of Appeals was that the right of respondent to recover damages in this action is governed by the laws of the forum and not the lex loci delicti. The Circuit Court of Appeals reversed the judgment and granted a venire facias de novo. This was an interlocutory decree and the question sought to be raised by a writ of certiorari can more properly be raised after the trial of the case on its merits.

2. The filing of the Affidavit of Defense on the

merits while it included a paragraph raising the question of the legal right to maintain the action was under all the authorities a waiver of any open question and for this reason the Writ of Certiorari should not be allowed.

Wherefore, the respondent respectfully prays that the Court refuse to grant a Writ of Certiorari.

LAURAN CHASE,
Respondent.

By FOX AND FOX,
Attorneys for the Respondent

BRIEF IN SUPPORT OF THE ANSWER OF THE RESPONDENT

1. Opinion of the United States Circuit Court of Appeals for the Third Circuit printed in the record shows that the Court directed a new trial. This was such an interlocutory decree as required that the case be tried on the merits and the question of the jurisdiction of the Court can be properly determined after the trial on the merits.

2. The Respondent further avers that there can be no such question raised because the Defendant has waived the right to assert a lack of jurisdiction.

ARGUMENT

A. Did the defendant waive all objections to jurisdiction?

B. Is the decision of the Circuit Court of Appeals that the lex loci delicti does not govern in conflict with the decisions of this Court?

POINT A

The suit was brought in March of 1927. On April 27th, the Defendant appeared and on the 9th of

May, 1927, filed an Affidavit of Defense to the merits. By the law of Pennsylvania Practice Act of 1915 which provides that the Defendant may raise any question of law without answering the averments of fact in the Statement of Claim and this may be disposed of by the Court on preliminary motion. By the Act of 1925 of Pennsylvania, P. L. 23, it is further provided that wherever in any proceeding at law or in equity the question of jurisdiction over the defendant or of the cause of action for which suit is brought is raised in the Court of first instance, it shall be preliminarily determined by the Court. And further provides for appeal and contains this provision: "A failure to appeal within the time specified will be deemed a waiver of all objections to jurisdiction over the defendant personally."

Therefore, if the Defendant had raised the question as required by the Act of 1915, the matter should have been disposed of preliminarily and the failure to do so must be regarded as a waiver of all objections.

Independent of this statutory provision the decision of the Supreme Court of Pennsylvania in the case of *Daley vs. Iselin*, 212 Pa. 279, the Court said:

> "The defendant could have prevented any pleading on the merits subsequent to his dilatory plea until that had been disposed of, if he had so desired. On the other hand, he could

unquestionably waive his right to insist on his plea and submit himself to the jurisdiction of the Court. This may be done as effectively by his acts as by his positive agreement, and we think that the defendant's conduct clearly establishes that he did so in this case. On October 1, 1901, the time the plaintiffs made their motion to strike the dilatory plea from the record, the plea of non assumpsit had been entered and had remained on the record for more than two years with the knowledge of defendant's counsel acquired from the trial lists. This motion should have been allowed had it been made at the time the cause was called for trial on its merits in September, 1900, when the defendant's counsel suggested that the plea in abatement should first be disposed of."

This case was followed by the following cases all of which sustain the position here taken:

Feather vs. Hustead, 265 Pa. 357;
Fennel vs. Guffey, 155 Pa. 38;
Larkin vs. Scranton, 162 Pa. 289;
Boyle vs. Breakwater Co., 239 Pa. 577;
Steel vs. Levy, 282 Pa. 338;
Specktor vs. Hanover Insurance Co., 295 Pa. 390.

In *Connaway vs. McLeod Bank,* 178 U. S. 421, the Court said:

"As to the suggestions that the suit was brought in the wrong district that objection,

if it could be raised by the company at all, came after the defendant had pleaded in bar and too late. Citing Texas & Pacific Ry. vs. Saunders, 151 U. S. 105; St. Louis & San Francisco Ry. vs. McBride, 141 U. S. 127; Texas & Pacific Ry. vs. Cox, 145 U. S. 593."

POINT B

DID THE DEATH OF THE DEFENDANT ABATE THE RIGHT OF ACTION IN PENNSYLVANIA?

The learned Judge of the District Court in his opinion says "this cause must look for its ruling to the misty subject of the Conflict of Laws."

There are a large number of cases in both the United States Courts and the State Courts relating to the question of the survivability of a pending action. In the present case at the time of the death of Ormsby no action was pending. By reason of the serious injury to the Plaintiff she was unable to give any attention or thought to the action. If Ormsby was negligent, (which must be conceded for the purpose of this argument), the falling of the elevator and the consequent injury to the plaintiff gave rise to a cause of action.

"A cause of action has been defined in general terms to be a legal right invaded without

justification or sufficient excuse. Upon such invasion a cause of action arises which entitles the party injured to some relief by the application of such remedy as the law may afford . . . Causes of action are sometime confounded with remedies, but the cause of action and the remedy sought, are entirely different matters." (1 R. C. L. p. 314).

Therefore, on the day of the accident a cause of action was created for the plaintiff against the defendant and vested in her a property right which could not be taken away except by the intervention of a statute of limitations. The remedy, as was said above, is separate and distinct from the cause of action. In this case the remedy was either a suit in the State of New York, where the injury occurred, or a suit in the State of Pennsylvania where Ormsby lived and the bulk of his property existed, and the right to bring this transitory action in either state continued to exist for the statutory period. (7 R. C. L. Page 1058). The plaintiff could, therefore, have begun her suit in Pennsylvania immediately after the accident. The death of Ormsby, nine months later did not change the vested property right of the plaintiff in the cause of action, nor did it change the principle of law that the assertion of her right by an action was transitory, not local and could be maintained in another state.

When, therefore, the plaintiff, after the death of Ormsby brought her suit in the United States Court

for the Eastern District of Pennsylvania, her rights are to be determined by the law of Pennsylvania which expressly provides that in case of death of the wrongdoer the personal representatives of the wrongdoer may be made parties defendant in such an action.

Section 955 of the Revised Statutes of United States does provide for the case of the death of a wrongdoer with an action pending, but is silent upon that question where the suit is not actually pending at the death. (See Title 28, U. S. Code Annotated, Sec. 778).

> "Whether a cause of action survives by law is not a question of procedure, but of right; and is determinable when the action is one arising at common law, not by the law of the state where the injuries were inflicted, but by the law of the state where the action is brought."
>
> *Martin vs. Wabash R. R. Co.*, 142 Fed. Rpt. 650.

The Federal Courts have in a number of cases recognized the fact that the survivability of a cause of action or a right of action is dependent upon the law of the forum or the law of the state wherein the action is brought. In 1 Ruling Case Law, page 27, Sec. 20, the principle is thus stated:

> "The survivability of a cause of action is a property right. Federal Courts, therefore, are governed by local state laws as to what causes

> of action survive and this is because State Legislatures have absolute dominion over the property or estate of dead men and over their affairs in their relation to the living. In determining what causes of action survive at common law, Federal Courts are governed by the law of the state where the action is brought."

In the case of *Tenn. Coal Co. vs. George*, 233 U. S. 354 suit was brought by servant against the master for injuries occasioned by defective machinery. The Act of Alabama provided that all actions must be brought in the Court of competent jurisdiction within the State of Alabama and not elsewhere. Suit was brought in Atlanta, Ga. A plea in abatement was filed setting up this provision of the Act of Alabama. The Court said:

> "Whether the statute be treated as prohibiting certain defenses as removing common law restrictions or as imposing upon the master a new and larger liability, it is in either event evident that the place of bringing the suit is not part of the cause of action. The right and the remedy are not so inseparably united as to make the right depend upon its being enforced in a particular tribunal. The cause of action is transitory and like any other transitory action to be enforced in any Court of competent jurisdiction within the State of Alabama."

See also the case of *Atchison T. & S. F. R. R. vs. Sowers*, 213 U. S. 55, in which the Court there an-

nounced the general rule that a transitory cause of action can be maintained in another state, even though the statute creating the cause of action provides that the action must be brought in local domestic Courts.

In *Schreiber ex. Sharpless*, 110 U. S. 76, the court held that the survivability of right of action is not a matter of procedure as in the remedy of a suit pending at the time of death.

In *Warren ex. Furstenheim*, 35 Fed. Reporter 691, it is said:

> "The right to revive an action in a Federal Court is made by the United States Statute to depend upon the survivability of the cause of action and the question whether a common law cause of action survives will be determined by the Federal Court in accordance with the law of the state where the action is brought, although the cause arose in another state."

We, therefore, believe it is a sound legal position to say that independent of the question of waiver as Ormsby was domiciled in Pennsylvania, and died in Pennsylvania, and his estate is administered in Pennsylvania the right of action which Miss Chase had and which was transitory is to be determined by the law of Pennsylvania and not by the law of New York.

In the case of *Martin v. Wabash*, 142 Fed. Rep. 650, the Court said:

"Whether a cause of action survived by law is not a question of procedure but of right and is determinable when the action is one arising at common law not by the law of the state where it arose but by the law of the state where the action is brought."

In the case of *Whitten v. Bennett*, 77 Fed. Rep. 272, the Court said:

"The survival of a cause of action for false imprisonment depends upon the law of the jurisdiction in which the tortfeasor is domiciled and not upon the law of the jurisdiction in which the wrong was committed."

In the case of *B. & O. v. Joy*, 173 U. S. 226, the Court said:

"Whether a pending action may be revived in a Federal Court upon the death of either party and proceed to judgment depends primarily upon the laws of the jurisdiction in which the action was commenced and in the present case is not affected in any degree by the fact that the deceased received his injuries in Indiana. The precise question in this case was 'does an action pending in the Circuit Court of the U. S. sitting in Ohio brought by the injured person as plaintiff to recover damages for injuries sustained by the negligence of the defendant in Indiana finally abate upon the death of the plaintiff in view of the fact that

had no suit been brought at all the cause of action would have abated, both in Indiana and Ohio, and that even if suit had been brought in Indiana the action would have abated in that state.' The Court answered, 'No.'"

The cases cited can be readily distinguished from the present case because the law of Pennsylvania under the Act of March 30th, 1921, Pamphlet Laws 235, gave to Miss Chase the right to make Ormsby's administrator a party defendant. That Act provides as follows:

> "March 30th, 1921, P. L. 255, Sec. 35 (b): Executors or administrators shall have power, either alone or jointly with other plaintiffs, to commence and prosecute all actions for mesne profits or for trespass to real property, and all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander and for libels; and they shall be liable to be sued, either alone or jointly with other defendants, in any such action, except as aforesaid, which might have been maintained against such decedent if he had lived."

We cite this statute, therefore, to show that notwithstanding any provision of the law of New York the law of Pennsylvania permits the bringing of this action as Ormsby was domiciled in Pennsylvania.

In *Martin v. B. & O.*, 151 U. S. 673, the Court held:

> "That whether the administrator has a right of action depends upon the law of West Virginia where the action was brought and the administrator appointed."

In *Dimmick vs. Railway Co.*, 103 U. S. 2, the Court held:

> "Wherever by either the common law or the statute a law of a state, a right of action has become fixed and a legal liability incurred that liability may be enforced and the right of action pursued in any Court which has jurisdiction of such matters and can obtain jurisdiction of the parties. The action in the present case is in the nature of trespass to the person always held to be transitory and the venue immaterial."

In Pollock, *Torts 11th Edition*, page 61, in discussing the rule that the right of action does not survive the death rights says that the rule is a barbarous one and proceeds:

> "Then as to the right; it is supposed that personal injuries cause no damage to a person's estate, and therefore, after his death the wrongdoer has nothing to account for. But this is ofttimes not so in fact and in any case why should the law contrary to its own principles and maxims in other departments presume it

in favor of the wrongdoer so to be."

If Ormsby as the owner of a large apartment building in New York was guilty of gross negligence in maintaining his elevator and he dies leaving an estate which includes among its assets this very apartment building, should not his estate respond in damages to the party injured by his negligence?

We, therefore, submit that a Writ of Certiorari should not be granted.

FOX AND FOX,
Attorneys for the Respondent.

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IN THE

Supreme Court of the United States

October Term, 1933 No. 101

LAURA ORMSBY AND B. RUSH FIELD, EXECUTORS OF THE ESTATE OF FRANK G. ORMSBY, DECEASED

Petitioners

v.

LOUISE CHASE, BY JESSE BLYTHE, PROCHEIN AMI, AND LOUISE CHASE, IN HER OWN RIGHT.

BRIEF FOR RESPONDENT (PLAINTIFF)

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

EDWARD J. FOX,
EDWARD J. FOX, JR.,
WAYNE E. BARBER,
Attorneys for Respondent,
308-311 Easton Trust Bldg.,
Easton, Penna.
FOX AND FOX,
Of Counsel.

Murrelle Printing Company, Paper Book Specialists, Sayre, Pa.

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IN THE SUPREME COURT OF THE UNITED STATES

Laura Ormsby and B. Rush Field, Executors of the Estate of Frank G. Ormsby, deceased
Petitioners,

vs.

Louise Chase, by Jesse Blythe, prochein ami, and Louise Chase in her own right,
Respondent (Plaintiff)

No. 101 Oct. Term, 1933

ARGUMENT FOR RESPONDENT

Louise Chase, the plaintiff, is a resident of St. Louis and was so in 1926. While temporarily living with her mother in a New York apartment house in October, 1925, she was injured in an elevator accident. She alleges that the accident was the result of the negligence of Frank G. Ormsby, the owner of the apartment house. She and her mother entered the elevator from their apartment on the fifth floor of the building on the morning of October 17, 1925. The elevator fell to the basement. The mother of the plaintiff died as a result of the injuries she received. The plaintiff was very seriously injured. She spent a year and a half in hospitals in New York City and in St. Louis and finally lost one of her legs. Shortly after the

accident her father also died. By reason of the fact that she was so terribly injured and was obliged to give all her attention to recovery from her injuries she did not bring any suit immediately after the accident. While she was confined to the hospitals she was completely paralyzed from the waist down for six months. She underwent six operations in New York and two in St. Louis, and the treatment of her spine required the application of special casts which immobilized her entire body for a period of six weeks.

Frank G. Ormsby, the owner of the building, died on June 14, 1926, at Easton Pennsylvania, where he had resided for a period of upwards of twenty years. Miss Chase was seventeen years of age at that time and suit was brought by her next friend in the United States District Court for the Eastern District of Pennsylvania on March 17th, 1927. This suit was brought after she had partially recovered. On the 27th of April, 1927, an appearance was entered for the defendants and an affidavit of defense was filed on the 9th of May, 1927. This affidavit of defense did not raise the legal question now presented to this court in the nature of a statutory demurrer, but the affidavit was a general defense on the merits of the controversy and constituted a general denial of the facts alleged in the statement of claim. In addition to the defense on the merits the affidavit also contained an averment that under the law of New York a right of action against a tort-feasor abates with the death of the alleged tort-feasor. Two years later depositions of witnesses for the plaintiff were taken, under an agreement by counsel, in St. Louis

and the witnesses were examined by counsel for the plaintiff and cross examined by counsel for the defendant.

After two years an attempt was made by counsel for the parties to present the legal question now raised to the learned Judge of the District Court; a stipulation was filed and submitted to him and the question duly argued. The learned Judge, however, was of the opinion that the question could not be disposed of under this stipulation and directed that the case be called for trial and an offer of proof made by the plaintiff which he would overrule and enter a compulsory non-suit. This was done. An appeal was then taken by the plaintiff to the United States Circuit Court of Appeals for the third circuit on the record as it stood and was heard before Judges Buffington, Davis and Thompson, Circuit Judges. The opinion of the court was subsequently filed determining the question which is now presented to this court against the defendant and directing a reversal of the judgment and the granting of a venire facias de novo.

Two questions are, therefore, presented to this court:

First: Could the plaintiff maintain an action against the executors of Ormsby after his death under the law of Pennsylvania?

Second: Did the defendants, by reason of their failure to file a statutory demurrer or to raise the question of law promptly, waive the right to set up the defense that the death of Ormsby abated action against his executors?

I.

THE DEATH OF THE TORT-FEASOR DID NOT TAKE AWAY THE RIGHT TO MAINTAIN THE ACTION IN PENNSYLVANIA

The learned counsel for the petitioner state that it is a settled principle of the conflict of laws that all questions bearing upon the nature and extent of a plaintiff's right to recover damages for a tort are determined solely by the substantive law of the State in which it is created. We do not assent to the correctness of that proposition. On the contrary, we allege that under the decisions of this court and under the repeated decisions in the lower courts contained in the Federal Reporter there is a great contrariety of opinion under the question that is now before the court for consideration. The learned Judge of the District Court, in the opinion which he filed (R. 10) opens his discussion of it with this significant statement:

> "This cause must look for its ruling to the misty subject of the conflict of laws" (R. 10).

The fact is that the learned Judge reached the conclusion that the plaintiff could not recover and that the learned Judges of the Circuit Court of Appeals reached the directly opposite conclusion, saying:

> "All the authorities agree that the survivability of a cause of action is a property right and not a question of procedure. State Legislatures have absolute dominion over the property or estate of dead men and determine what causes of action survive and what abate with their death. Whether or not a cause of action

survives is, therefore, determined by the laws of the State where the action is brought and not by the laws of the State in which the injury was inflicted" (R. 19).

There are a large number of cases both in the United States Courts and in the State Courts relating to the survivability of a pending action. Indeed in most of the cases submitted by both parties to this litigation, the question arises where an action had preceded the death of the defendant. In the present case at the time of the death of Ormsby no action was pending. As already explained, by reason of the plaintiff's injuries she was unable to give any attention or thought to the bringing of an action. If Ormsby was negligent (which for the purpose of this argument must be conceded) the falling of the elevator and the consequent injuries to Miss Chase gave rise to a cause of action.

> "A cause of action has been defined in general terms to be a legal right invaded without justification or sufficient excuse. Upon such invasion a cause of action arises which entitles the party injured to some relief by the application of such remedy as the law may afford. Causes of action are sometimes confounded with remedies, but the cause of action and the remedy sought are entirely different matters." (1 R. C. L., p. 314).

Therefore, on the day of the accident a cause of action was created for the plaintiff against the defendant and it vested in her a property right which could not be taken away except by the intervention of a statute of limitations. The remedy is separate and distinct from the cause of action. In this case

the plaintiff had a choice of remedies. It was either a suit in the State of New York where the injury occurred, or a suit in the State of Pennsylvania where Ormsby had lived for many years and where the bulk of his property existed. The right to bring this transitory action in either State continued to exist unless it was abrogated (7 R. C. L. p. 1058). The plaintiff could, therefore, have begun her suit in Pennsylvania immediately after the accident. The death of Ormsby, nine months later, did not change the vested property right of the plaintiff in the cause of action, nor did it change the principle of law that the assertion of her right by an action was transitory, not local, and could be maintained in another State.

When, therefore, the plaintiff after the death of Ormsby, brought her suit in the United States Court for the Eastern District of Pennsylvania, her rights are to be determined by the laws of Pennsylvania which expressly provide that in case of death of the wrongdoer the personal representatives of the wrongdoer may be made parties defendant in such an action.

As we have already said many of the cases in which this question is discussed arise where an action was pending at the time of the death of the wrongdoer. But, nevertheless, the statement of principle made in these cases often affords some guide toward reaching a solution of the present question.

Section 955 of the Revised Statute of the United States provides for the case of the death of a wrongdoer with an action pending, but is silent upon that question where the suit is not actually pending

at the death (see Title 28 U. S. Code Annotated, Sec. 778).

The Federal Courts have in a number of cases recognized the fact that the survivability of a cause of action or a right of action is dependent upon the law of the forum or the law of the State wherein the action is brought. In 1 Ruling Case Law, page 27, Sec. 20, the principle is thus stated:

> "The survivability of a cause of action is a property right. Federal Courts, therefore, are governed by local State laws as to what causes of action survive and this is because State Legislatures have absolute dominion over the property or estate of dead men and over their affairs in their relation to the living. In determining what causes of action survive at common law, Federal Courts are governed by the law of the State where the action is brought."

The Circuit Court of Appeals upon this point says:

> "In New York the death of Ormsby abated the action but in Pennsylvania it survived. The Act (Penna.) of March 30th, 1921 (P. L. 53 ~~255~~, Sec. 35 (b), provides that 'Executors shall be liable to be sued, either alone or jointly with other defendants, in any such action, except as aforesaid, which might have been maintained against such decedent if he had lived.'"

If Ormsby had lived, undoubtedly this suit might have been brought and maintained against him.

In the case of *Tennessee Coal Co. vs. George*, 233 U. S. 354, a suit was brought by a servant against the master for injuries occasioned by defective machinery. The accident occurred in Alabama but the

suit was brought in Georgia. On this ground the defendant filed a plea in abatement. The plaintiff demurred to the plea in abatement and the Court sustained the demurrer. The Act of Alabama provides that all actions must be brought in a Court of competent jurisdiction within the State of Alabama and not elsewhere. The Court said:

> "Whether the statute be treated as prohibiting certain defenses as removing common law restrictions or as imposing upon the master a new and larger liability, it is in either event evident that the place of bringing the suit is not part of the cause of action. The right and the remedy are not so inseparably united as to make the right depend upon its being enforced in a particular tribunal. The cause of action is transitory and like any other transitory action to be enforced in any Court of competent jurisdiction within the State of Alabama. But the owner of the defective machinery causing the injury may have removed from the state and it would be a deprivation of a fixed right if the plaintiff could not sue the defendant in Alabama because he had left the state nor sue him where the defendant or his property could be found because the statute did not permit a suit elsewhere than in Alabama. The injured plaintiff may likewise have moved from Alabama and for that or other reason may have found it to his interest to bring suit by attachment or in personam in a state other than where the injury was inflicted. The Courts of the sister state trying the case would be bound to give full faith and credit to all those substantial provisions of the statute which inhered in the

cause of action or which named conditions on which the right to sue depend. But venue is no part of the right and a state cannot create a transitory cause of action and at the same time destroy the right to sue on that transitory cause of action in any Court having jurisdiction. That jurisdiction is to be determined by the law of the Court's creation and cannot be defeated by the extraterritorial operation of a statute of another state, even though it created the right of action.

"The case here is controlled by the decision of this Court in Atchison T. & S. F. R. R. vs. Sowers, 213 U. S. 55, where the New Mexico statute giving a right of action for personal injuries and providing that suits should be brought after certain form of notice in a particular district was preceded by the recital that it has become customary for persons claiming damages for personal injuries received in this territory to institute and maintain suits for the recovery, although in other states and territories to the increased cost and annoyance and manifest injury and oppression of the business interests of this territory and the derogation of the dignity of the Courts thereof. Despite this statement of the public policy of the territory the judgment obtained by the plaintiff in Texas was affirmed by this Court in an opinion wherein it was said that where an action is brought in another jurisdiction based upon common law principles although having certain statutory restrictions such as are found in this Act as to the making of an affidavit and limiting the time of prosecuting

the suit, full faith and credit is given to the law and recovery is permitted subject to restrictions upon the right of action imposed in the territory enacting the statute.

"It is claimed, however, that the decision in the Sowers case is not in point because the plaintiff is there seeking to enforce a common law liability while here he is asserting a new and statutory cause of action. But that distinction marks no difference between the two cases because in New Mexico common law liability is statutory liability, the adopting statute provided that the common law as recognized in the United States of America shall be the rule of practice and decision.

"The decision in the Sowers case, however, was not put upon the fact that the suit was based on a common law liability. The Court there announced the general rule that a transitory cause of action can be maintained in another state, even though the statute creating the cause of action provides that the action must be brought in local domestic Courts. In the present case the Georgia Court gave full faith and credit to the Alabama Act and its judgment is affirmed."

In *Atchison, Topeka and Santa Fe R. R. Co. vs. Sowers*, 213 U. S. 55, the Court, speaking by Mr. Justice Day, said:

"An action for personal injuries is universally held to be transitory, and maintainable wherever a Court may be found that has jurisdiction of the parties and subject-matter. Rorer on Interstate Law, 154-155;

McKenna vs. Fisk, 1 Howard, 242; Dennick vs. Central Railroad Company, 103 U. S., 11. Undoubtedly, where the cause of action is created by the State, as is the action to recover for death by wrongful injury; there is no objection to the enforcement of the law because it arose in another jurisdiction. Northern Pacific Railroad Company vs. Babcock, 154 U. S., 190; Stewart vs. Baltimore & Ohio Railroad Company, 168 U. S. 445. In the latter case this Court said: 'As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. But when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the lex fori, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an obligatio, which, like other obligations, follows the person, and may be enforced wherever the person may be found."

In the case of *Dennick vs. Railroad Company*, 103 U. S. 11, the Court said:

"We do not see how the fact that it was a statutory right can vary the principle that a party legally liable in New Jersey cannot escape that liability by going to New York. If the liability to pay money was fixed by the law

of that state where the transaction occurred, is it to be said that it can be enforced nowhere else because it depended upon statute law and not upon common law? It would be a very dangerous doctrine to establish, that in all cases where the several States have substituted the statute for the common law, the liability can be enforced in no other State but that where the statute was enacted and the transaction occurred. The common law never prevailed in Louisiana, and the rights and remedies of her citizens depend upon her civil code. Can these rights be enforced or the wrongs of her citizens be redressed in no other State of the Union? The contrary has been held in many cases."

In *Martin vs. Baltimore & Ohio Railroad*, 151 U. S. 673, the Court, speaking by Mr. Justice Gray, said:

"The question whether a particular cause of action is of a kind that survives for or against the personal representative of a deceased person is a question not of procedure, but of right. As was said by Chief Justice Waite, speaking for this Court: 'The personal representatives of a deceased party to a suit cannot prosecute or defend the suit after his death, unless the cause of action, on account of which the suit was brought, is one that survives by law. Revised Statutes, 955.' The right to proceed against the representatives of a deceased person depends not on forms and modes of proceeding in a suit but on the nature of the cause of action for which the suit is brought. If the cause of action survives, the practice, pleadings

and forms and modes of proceeding in the Courts of the State may be resorted to in the Courts of the United States for the purpose of keeping the suit alive and bring in the proper parties. But if the cause of action dies with the person, the suit abates and cannot be revived. Whether an action survives depends on the substance of the cause of action, not on the forms of proceeding to enforce it. In Re: Schreiber vs. Sharpless, 110 U. S. 76. In that case, the right in question being an action for a penalty under a statute of the United States, the question whether it survived was governed by the laws of the United States. But in the case at bar, the question whether the administrator has a right of action depends on the law of West Virginia, where the action was brought and the administrator appointed."

So, therefore, we say, applying the doctrine of this case to the case at bar, as the law of Pennsylvania gave the right of action against the executor or administrator of the tort-feasor the action can be maintained.

In the case of *Sullivan vs. Associated Billposters*, 6 Federal Reporter (2nd), page 1000, the Circuit Court of Appeals for the Southern District of New York, speaking by Rogers, Circuit Judge, said:

"Sir Frederick Pollock, in his Work on Torts (11th Edition, 61), discussing the effect produced on liability for a death of either the person wronged or the wrongdoer, declares it to be one of 'the least rational parts' of the law. And he also declares that when once the notion of vengeance has been put aside and that

of compensation substituted the rule actio personalis moritur cum persona, seems to be without plausible ground. First as to the liability: it is impossible to see why a wrongdoer's estate should ever be exempted from making satisfaction for his wrongs. It is better that the residuary legatee should be to some extent cut short than the person wronged should be deprived of redress."

The Court further said:

"And for like reason it would seem that the representatives of a deceased person should be liable to answer out of their decedent's estate for the wrongful acts committed by him in his lifetime, whereby another had suffered in his estate, and by which the estate of the wrongdoer had increased the amount of his own estate. Whether or not existing law permits this, and whether upon the facts alleged it appears that the plaintiff's estate was diminished or the defendant's estate increased by his wrongful acts, must now be considered."

The Court, therefore, held that the action could be maintained.

In *Warren vs. Furstenheim*, 35 Federal Rep., 691, the Court said:

"In support of the ruling here made the first essential observation is to note with emphasis the distinction between the abatement of a suit by the death of one or both of the parties to it and the abatement of a cause of action by force of the maxim, actio personalis moritur cum persona. The first is a matter of procedure, purely so; and Congress has made its own rule,

as it may, and by the Practice Conformity Act likewise adopted the State practice where its own legislation does not control. At common law, every suit, whether founded on contract or tort, abated by the death of either party, and could proceed no further. It absolutely perished. One class of English statutes having the force of common law with us abrogated this rule, and allowed the executor or administrator to come in voluntarily or be brought in by scire facias. It was the condition of these statutes that the revival could take place only 'if such action might be originally prosecuted or maintained by or against the executors or administrators of the party dying;' that is to say, provided the cause of action should be affected by the deadly force of the above-mentioned maxim. Now, where or when it was so affected was and is to this day one of the most perplexing subjects with which the Courts have had to deal."

In *Martin vs. Wabash Railroad Company*, 142 Federal Reporter, 650, the Court, speaking by Judge Grosscup, said:

"By the Judiciary Act of 1789, embodied now in the Revised Statutes, it is provided 'that when either of the parties, whether plaintiff or petitioner, or defendant, in any suit in any Court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend such suit to final judgment.'

"Whether a cause of action survives by law

is not a question of procedure, but of right; and is determinable when the action is one arising at common law, not by the law of the State where the injuries were inflicted, but by the law of the State where the action was brought." Baltimore & Ohio R. R. Co. vs. Joy, 173 U. S. 226.

In the case of *Baltimore & Ohio R. R. Co. vs. Joy*, 173 U. S. 226, the Court said:

"Whether a pending action may be revived in a Federal Court upon the death of either party, and proceed to judgment depends primarily upon the laws of the jurisdiction in which the action was commenced, and in the present case is not affected in any degree by the fact that the deceased received his injuries in Indiana. The precise question in this case was 'Does an action pending in the Circuit Court of the United States sitting in Ohio, brought by the injured person as plaintiff to recover damages for injuries sustained by the negligence of the defendant in Indiana, finally abate upon the death of the plaintiff in view of the fact that, had no suit been brought at all, the cause of action would have abated both in Indiana and Ohio, and that even if suit had been brought in Indiana, the action would have abated in that State.'"

The Court further said:

"It is clear that under the statutes of Ohio, as interpreted by the highest Court of that State, the action might have been revived in the State Court in the name of the personal representative of Hervey (the plaintiff and de-

cedent) and proceeded to final judgment. We think that the right to revive attached under local law when Hervey brought his action in the State Court. It was a right of substantial value, and became inseparably connected with the cause of action so far as the laws of Ohio were concerned. Was it lost or destroyed when, upon the petition of the railway company, the case was removed for trial into the Circuit Court of the United States? Was it not rather a right that inhered in the action and accompanied it when in the lifetime of Hervey the Federal Court acquired jurisdiction of the parties and the subject-matter? This last question must receive an affirmative answer."

We submit, therefore, that under all these authorities inasmuch as the cause of action vested in Miss Chase immediately on the happening of the accident and as the law of Pennsylvania provided that in case of the death of either party an action can still be maintained against the personal representatives, this suit was properly brought under the law of Pennsylvania.

Stress is laid by the learned counsel for the petitioner upon a number of cases decided in this Court, which we believe can be readily distinguished from the case at bar. One of these cases is the case of *Davis vs. Mills*, 194 U. S. 451. The plaintiff, a citizen of Montana, brought suit in Connecticut against the directors of a mining company which had failed to file in Montana certain required reports. The law of Montana required that a right of action could only be brought against the directors within three years after the alleged delinquency. In the suit to

enforce liability against the directors, this Court, speaking by Mr. Justice Holmes, said:

> "The general theory on which an action is maintained upon a cause which accrued in another jurisdiction is that the liability is an obligatio, which, having been attached to the person by the law then having that person within its power, will be treated by other countries as accompanying the person when brought before their Courts. But, as the source of the obligation is the foreign law, the defendant, generally speaking, is entitled to the benefit of whatever conditions and limitations the foreign law creates. Slater vs. Mexican National Railroad, 194 U. S. 120. It is true that this general proposition is qualified by the fact that the ordinary limitations of actions are treated as laws of procedure and as belonging to the lex fori, as affecting the remedy only and not the right. But in cases where it has been possible to escape from that qualification by a reasonable distinction Courts have been willing to treat limitations of time as standing like other limitations and cutting down the defendant's liability wherever he is sued. It is merely a ground for saying that the limitation goes to the right created and accompanies the obligation everywhere. In the case at bar the question comes up in the most attenuated form. The law is dealing not with tangible property, but with a cause of action of its own creation. The essential feature of that cause of action is that it is one in the jurisdiction which created it; that it is one elsewhere is a more or less accidental incident."

In the instant case, immediately on the happening of the accident the cause of action arose against Ormsby, a resident of Pennsylvania. That cause of action was transitory and was not given to the plaintiff by statutory enactment as in the case of Davis vs. Mills. It would have been possible to have brought suit either in New York or Pennsylvania immediately. By the law of Pennsylvania this cause of action survived and Ormsby's executors are, therefore, liable for his wrong. It would seem that the ruling of Mr. Justice Holmes does not sustain the position of the appellant. The opinion holds that the law is dealing not with tangible property but with a cause of action of its own creation. In the case at bar we are dealing with a cause of action which is a property right. It is "tangible property." It was not created by the State of New York or by the State of Pennsylvania by statutory enactment but existed and arose immediately upon the fall of the elevator. It vested at once in the plaintiff.

The case cited by Mr. Justice Holmes of *Slater vs. Mexican National Railroad*, 194 U. S. 120, likewise does not sustain the position of the petitioner in this case. By the law of Mexico in a suit for damages by the wife to recover for negligence causing the death of her husband in Mexico, the laws of Mexico provide that in cases of this kind damages should be in the nature of alimony and pensions during necessity or until remarriage. The Court, therefore, held that a verdict for a lump sum apportioned to the several plaintiffs could not be permitted because the law of Mexico would not provide for a lump sum but did provide for the alimony and pensions. It is to be noted also that

Mr. Chief Justice Fuller and Justices Harlan and Peckham filed dissenting opinions in which they held that the verdict could be properly sustained.

Another case relied upon by the petitioner is the case of *Bradford Electric Light Co. vs. Clapper*, 286 U. S. 145. In this case a man employed in Vermont and also in New Hampshire by a manufacturing company tacitly accepted the Vermont Workmen's Compensation Act. He was injured while in New Hampshire performing some duty for the company which employed him, but left no New Hampshire dependents.

In a concurring opinion filed by Mr. Justice Stone he says:

> "It seems unnecessary to decide whether that result could be compelled, against the will of New Hampshire, by the superior force of the full faith and credit clause of the Constitution. If decision of that question could not be avoided, I should hesitate to say that the Constitution projects the authority of the Vermont statute across State lines into New Hampshire, so that the New Hampshire Courts, in fixing the liability of the employer for a tortious act committed within the State, are compelled to apply Vermont law instead of their own. The full faith and credit clause has not hitherto been thought to do more than compel recognition outside the State and of the operation and effect of its laws upon persons and events within it . . .
>
> "It is true that in this case the status of employer and employee, terminable at will, was created by Vermont laws operating upon them while they were within that State. I assume

that the fact of its creation there must be recognized elsewhere, whenever material. But I am not prepared to say that that status, voluntarily continued by employer and employee and given a locus in New Hampshire by their presence within the State, may not be regulated there according to New Hampshire law, or that the legal consequences of acts of the employer or employee there, which grow out of or affect the status in New Hampshire, must, by the mandate of the Constitution, be either defined or controlled in the New Hampshire Courts, by the laws of Vermont rather than of New Hampshire."

We submit that applying the principle enunciated by Mr. Justice Stone in this opinion it is equally true that the authority of New York State should not be projected across the State lines into Pennsylvania.

We say that the legal consequences of the acts of Ormsby in New York (which grow out of or affect the statutes in New York) should neither define or control in the Pennsylvania Courts the right of the plaintiff to recover damage for her injuries.

Another case relied upon is the case of *Orr vs. O'Heron*, 107 Conn., 174. In that case Mr. Justice Wheeler of the Supreme Court of Connecticut said:

"The fallacy of this decision is in its assumption that under the common law of New York the right of action for personal injuries was a substantive right existing wherever a common law right existed which, though abated in the place of the wrong, would still exist in a foreign jurisdiction which had a survival statute, and had obtained jurisdiction of the parties to the action after the abatement of the

action in the State of origin, New York created the right of action for this wrong. The power which gave the right to take it away. When by its law the death of the injured person abated the right of action for this wrong the right no longer existed in that jurisdiction nor thereafter in any other jurisdiction."

We assert that there is fallacy in the reasoning of Mr. Justice Wheeler in that it assumes that the State of New York created the right of action. The right of action existed by the common law and was not created by the State of New York or by the State of Pennsylvania. At the time of the accident this right of action existed. It could be asserted in either New York or Pennsylvania. The Connecticut Court goes further and asserts that if suit had been brought in Connecticut and the tort-feasor had died his death would not have affected the action in Connecticut. If, therefore, New York had the right or power to take away the original cause of action it would seem inconsistent to hold that it could not take away the right of action if suit had actually been brought there. But as this case conflicts with the cases which we have already cited, decided in the Federal Courts, we submit that it is not a controlling decision.

Stress is also laid on the case of *Sumner vs. Brown*, 312 Pennsylvania, 124, which is a recent decision. In that case plaintiff was injured in New York as the result of the alleged negligence of a firm, one of the members of which was killed in the accident. Subsequently his surviving partner died. Suit was instituted in the Common Pleas of Pennsylvania against the estate of the surviving partner of the original tort-feasor. A demurrer was

filed to the statement of claim on the ground that the plaintiff had not averred that the law of New York provided for a survival of the common law cause of action.

The precise question raised in the case at bar is not discussed by Mr. Justice Linn. The decision rests upon the question of whether a partnership was a legal entity and it was held that the New York law quoted by the appellant was not sufficient to establish the fact that the law of New York as to partnerships was the same as the law of Pennsylvania. We submit, that this decision is not controlling in the present case.

It is asserted in the argument of counsel for the petitioners on Page 22: "It is conceded in the case at bar that under the law of New York the respondent had no right of action after Ormsby's death" (referring to the record on page 19). We do not make any such concession.

To summarize the result of the authorities which we have cited, we say:

(A) The cause of action arising out of the injury which the plaintiff suffered was a property right which could not be impaired, diminished or extinguished by the death of the tort-feasor.

(B) The right of action being transitory not local, it must be governed by the *lex fori* not by the *lex delicto*.

(C) The obligatio follows the person and may be enforced wherever the person may be found.

(D) As the statute of Pennsylvania expressly provides that in case of the death of the tort-feasor his personal representatives may be made parties

defendant in an action, a suit was, therefore, properly brought in Pennsylvania.

(E) A tort-feasor's estate and property should not be exempt from making satisfaction for his tort. There should be no distinction between his obligation *ex contractu* and *ex delicto*.

II.

THE DEFENDANT WAIVED OBJECTION TO THE ABATEMENT OF THE ACTION BY REASON OF THE DEATH OF THE TORT-FEASOR

This suit was brought as the result of an accident occurring on October 17th, 1925. On the 17th of March, 1927 the action was begun and the statement of the plaintiff's claim was filed. On April 27th, 1927 counsel for the defendant entered appearance. On May 9th, 1927 the defendant filed an affidavit of defense to the merits of the controversy alleging that the defendant's testator had not been guilty of negligence, it also containing a paragraph averring that the right of action against an alleged tort-feasor abates with his death. After a considerable period of time an agreement of counsel was made permitting the defendant to file an amended affidavit of defense. This reiterated the defense relied upon to meet the merits of the case and also averred that any right of action which existed prior to the death of Ormsby abated with his death. On the 18th day of April, 1929 by agreement of counsel depositions were taken in St. Louis on behalf of the plaintiff relating to the merits of the controversy and counsel for the defendant appeared and cross examined the witnesses who were called by

the plaintiff. The issue was therefore joined. Twice the plaintiff came from St. Louis at great expense and had the attendance of her witnesses in Philadelphia for the trial of the case. When finally it was reached for trial and the jury was being selected, the Learned Judge of the Court below having inspected the affidavit of defense discovered the fact that a legal question as to the right of the plaintiff to recover had been raised. This question was not raised however in accordance with the manner required and prescribed by the law of Pennsylvania for the determination of the rights of action grounded in law. The Learned Judge therefore suggested that the jury be dismissed and that a stipulation be filed raising this legal question. Counsel attempted to do this and submitted it to the Court but in the opinion filed it was held that the question had not been properly raised by the stipulation and that a trial must be had. On the trial an offer of proof by the plaintiff was made setting forth the facts which it was proposed to establish (R. 14). This offer was objected to on the ground that the facts offered were immaterial and irrelevant in view of the fact that Ormsby died before any suit was instituted. The Court sustained the objection to the offer, allowed an exception, and granted a compulsory non-suit, which was also excepted to. We assert that this was not the proper method to dispose of the case and that the conduct of the defendant in pleading to the merits and in cross examining the plaintiff's witnesses instead of filing a statutory demurrer to dispose of the question of the abatement of the action must be construed as a waiver of the right to make this defense. We direct the attention of the Court particularly to the affidavit

of defense in which they plead "*that a right of action against an alleged tort-feasor abates with the death of the alleged tort-feasor.*" In the stipulation permitting an amended affidavit of defense to be filed, they again averred that a right of action having existed prior to the death of Ormsby "*abated with his death.*" The affidavit of defense therefore contained a pleading to the merits of the controversy which was a plea in bar and contained a plea in abatement.

The coupling of a plea in bar and a plea in abatement is universally recognized as a waiver of any rights under the plea in abatement.

Section 20 of the Practice Act of 1915, P.L. 483, of Pennsylvania provides that the defendant in the affidavit of defense may raise any question of law without answering the averments of fact in the statement of claim and any question of law so raised may be set down for hearing and disposed of by the Court.

> "As a rule in the absence of a statute to the contrary, where the Court has general jurisdiction of the subject matter, objection to jurisdiction of the person and other objections to the jurisdiction which go merely in abatement must be raised *in limine* by plea or answer to the jurisdiction or in abatement, or by special exception, demurrer, or motion, according to the practice in the particular jurisdiction, and before pleading to the merits or demurring generally, or they will be waived."
>
> 1 *C. J.* p. 37.

In addition to the Act of 1915 the Act of 1925 Pamphlet Laws of Pennsylvania 23 contains the following provision:

"SECTION 1. Be it enacted, etc., That wherever in any proceeding at law or in equity the question of jurisdiction over the defendant *or of the cause of action for which suit is* brought is raised in the Court of first instance, it shall be preliminarily determined by the Court upon the pleadings or with depositions as the case may require; and the decision may be appealed to the Supreme Court or the Superior Court, as in cases of final judgments."

"SECTION 2. All such preliminary questions shall be raised by petition setting forth the facts relied upon, whereupon a rule to show cause shall be granted, and such preliminary question disposed of by the Court. Such procedure shall be deemed *de bene esse* only and shall not operate as a general appearance."

"SECTION 3. The appeal here provided for must be taken and perfected within fifteen days from the date when the decision is rendered; shall be made returnable on the third Monday after it is taken; and shall be placed by the Appellate Court at the head of its argument list for civil cases to be heard at the earliest date consistent with its rules governing the presentation of appeals; Provided, That as to decision made prior to the approval of this act the fifteen days limitation shall not begin to run until after the date of its approval. A failure to appeal within the time specified *will be deemed a waiver of all objections to jurisdiction over the defendant personally.*"

This enactment simply places in statutory form what is the universal rule in all jurisdictions with reference to the pleading, namely; that a plea in

abatement or any preliminary legal question which challenges the right of the plaintiff to maintain his action must be raised and disposed of promptly. There is sound reason for this. It is aptly pointed out in the case of *Daley vs. Iselin*, 212 Pa. 279, at page 286. Judge Mestrezat says:

> "Pleas in abatement should not be regarded with favor, and when a party by entering the plea seeks to oust the jurisdiction of the Court and thereby delay a trial of the cause on its merits, he must confine his action strictly to enforcement of the plea. With that plea upon the record, no further action can be taken in the cause without the defendant's consent until it is disposed of by trial or otherwise. If the plea is sustained, it puts an end to the suit in its incipiency and requires the plaintiff to institute another action, possibly in another form, if he would have the merits of his claim adjudicated. Being a dilatory plea and having the effect of preventing a trial on the merits, it is reasonable and just that he should interpose it and be required to act promptly in having it disposed of, and failing to do so, or if he take any steps looking to a trial of the cause on the merits, he must be held to have waived the right to insist upon his plea and his conditional appearance will become general."

The present case affords a striking illustration of the injustice of a postponed determination of this preliminary legal question. The suit was brought in March, 1927. The issue was joined in May, 1927. In October, 1933, this question is still undetermined. Three times the case has been on the trial list. Twice the plaintiff, a resident of St. Louis, in greatly

straitened circumstances because of the death of her parents (one of whom was killed in this accident) has made the long and expensive journey to Philadelphia and was in attendance with her witnesses. Had the provisions of the Act of 1915 or of 1925 been followed the question now raised could have been disposed of by October, 1927. The plaintiff would not then have been subjected to the expense incident to her attending the trial on the merits.

It may be suggested that the question of waiver would only apply in case of a plea of abatement which was a dilatory plea but in the Act above-quoted, as well as the opinion of the Supreme Court in *Daley vs. Iselin, supra,* it is held that this question of waiver applies equally to an objection to the jurisdiction.

Mr. Justice Mestrezat says:

> "On September 20, the defendant, 'appearing especially and solely to object to the jurisdiction of this Court,' filed a plea to the jurisdiction, setting forth that he was not in Clearfield County at the time of the service of the writ; that he is and was at the time of the service of the writ a citizen and resident of the State of New York; that he has not been engaged in any business in Clearfield County, and that Robinson, on whom the writ was served, at no time was a resident of Clearfield County and had no place of business in that county. On the day after this plea was filed the defendant filed an affidavit of defense, and therein, after reserving his rights under his plea to the jurisdiction, he set up at length a defense to the merits of the plaintiffs claim."

It will, therefore, be seen that in this case, which is a leading case on the question of waiver, it was more than a mere dilatory plea, it challenged the jurisdiction of the Court on the ground that the defendant was not a resident of Pennsylvania, but a resident of New York. Judge Mestrezat applied the doctrine of waiver and held that the question of jurisdiction had been waived by the filing of an affidavit of defense on the merits.

It may be suggested that plaintiff should have moved to have this question determined. The Act of 1925 puts the burden on the defendant. Had the plaintiff attempted to force the determination of the question immediately on the filing of the affidavit of defense, she would thereby have forfeited her right to raise the question which is now raised by her that the defendant by pleading to the merits waived the right to raise the legal question now contended for by the defendant.

Paragraph eleven of the affidavit of defense was a plea in abatement. The Act of 1915 abolished pleas in abatement (R. 7). A cause of action has been defined as:

> "Matter for which an action may be brought; the subject matter of controversy; the subject matter upon which plaintiff grounds his right of recovery; the ground upon which an action may be maintained or sustained (1 C. J. 936)."

The right of action has also been defined as:

> "The right to commence and maintain an action,"

and the phrase is frequently used as synonymous with cause of action, although in some cases it has been distinguished. In the instant case where the

negligence of Ormsby caused the fall of the elevator and the injury to Miss Chase the right of action or the cause of action, or both, existed immediately after the accident. Miss Chase could have brought her action the next day or at any time within the statute of limitations and Ormsby would have had to respond. The right of action was transitory. Ormsby was a resident of the State of Pennsylvania and the fact that he was domiciled in Pennsylvania under our decisions and under our statute gave to Miss Chase the right to bring her action in Pennsylvania. This right of action thus vested in Miss Chase and being transitory did not abate so far as the Courts in Pennsylvania were concerned.

In 1 C. J., page 26, a plea in abatement is defined to be

> "a plea without disputing the justice of the plaintiff's claim, objects to the place, mode or time of asserting it, and requires that, therefore, and *pro hac vice*, judgment be given for the defendant, leaving it open to renew the suit in another place or form, or at another time. At law the abatement of a suit is a complete termination of that particular suit, so that it cannot be revived; but it does not determine or defeat plaintiff's *cause of action* or bar the issuance of a new writ or the institution of a new suit."

Therefore, this cause of action or the right of action which vested in Miss Chas at the time of the accident was not abated or determined by the death of the wrongdoer. The law of New York provides that its process is not available for the enforcement of the right in New York, but this does not mean that this transitory action which could be brought

in Pennsylvania; the domicile of the wrongdoer, abates because of the provision of the law in New York. If the suit had been brought in Pennsylvania prior to the death of Ormsby and had not been reached for trial, his death would not have abated the action.

In the case of *Daley vs. Iselin*, 212 Pa. 279, the Court said:

> "The defendant could have prevented any pleading on the merits subsequent to his dilatory plea until that had been disposed of, if he had so desired. On the other hand, he could unquestionably waive his right to insist on his plea and submit himself to the jurisdiction of the Court. This may be done as effectively by his acts as by his positive agreement, and we think that the defendant's conduct clearly establishes that he did so in this case. On October 1, 1901, the time the plaintiffs made their motion to strike the dilatory plea from the record, the plea of non-assumpsit had been entered and had remained on the record for more than two years with the knowledge of defendant's counsel acquired from the trial lists. This motion should have been allowed had it been made at the time the cause was called for trial on its merits in September, 1900, when the defendant's counsel suggested that the plea in abatement should first be disposed of."

In the case of *Feather vs. Hustead*, 257 ~~285~~ Pa. 357, the Court also said:

> "In the present case both the affidavit which set up the matter in abatement and a general issue plea were filed on the same day. The rule is that a plea in abatement must be entered be-

fore one in bar and that the former fails of effect after the filing of the latter."

In the case of *Fennel vs. Guffey*, 155 Pa. 38, the Court said:

> "If we conceded defendant's position it was too late to take advantage of it after plea pleaded; it was at most a personal exemption and the point should have been raised before trial; by failing to do so he has waived his privilege."

In *Larkin vs. Scranton*, 162 Pa. 289, the Court said:

> "The exception to the jurisdiction raised in the third assignment need not be considered. It comes too late. The city had notice of the appointment of the viewers, of their report, and the plaintiff's appeal and when the issue was framed on the appeal the city pleaded to it without objection . . . the parties by their conduct had waived the right to object that they were not properly before it. The plea in abatement is too late as a plea in bar or to the merits."

In *Boyle vs. Breakwater Co.*, 239 Pa. 577, the Court said:

> "As the record discloses, the rule to suppress the statement was not taken until after the defendant had filed an affidavit of defense to the merits of the claim and a rule had been taken for want of a sufficient affidavit of defense. One who seeks to avail himself of technical objections to pleadings must do so at the earliest opportunity. He cannot be permitted by his pleadings to raise an issue on the merits of the case and thereafter to attack the suffici-

> ency of his opponent's pleadings; and he does so if, without objection, he proceeds to invite the judgment of the Court on the merits of the case. It is well settled that a demurrer and affidavit of defense cannot be filed to a statement of claim at the same time. The filing of the affidavit to the merits is an abandonment of the demurrer."

In *Steel vs. Levy*, 282 Pa. 338, Mr. Justice Simpson said:

> "In answer to the statement defendant filed two papers, both on the same day, (1) a plea in abatement alleging the pendency of another suit for the same cause of action; this was improper as such pleas are expressly abolished by the Practice Act of 1915; and (2) an affidavit of defense and plea in bar in which he presented issues of fact as well as of law, the latter being placed on the allegation that the same causes of action had already been or could have been heard and disposed of in the trial of a previous suit between the same parties in the same Court. Joining the two kinds of defenses was a procedural mistake; only the legal issues should have been advanced in the first instance: Jackson vs. Myers, 260 Pa. 488."

In the case of *Specktor vs. Hanover Insurance Co.*, 295 Pa. 390, Mr. Justice Simpson said, speaking for the Court:

> "With us the later actions of defendant above-stated operate as a waiver of the right to object further to the jurisdiction of the Court over the person of the defendant (Daley vs. Iselin, 212 Pa. 279) and this being so, proceeding to

trial and judgment was not a violation of the due process clause of the 14th amendment to the Constitution of the United States; Western Life Indemnity Co. of Illinois vs. Rupp, 235 U. S. 261. Nevertheless, since there seem to be a multitude of insurance cases growing out of the fire which resulted in this suit, all raising the same issues, we will specifically consider the other points made by defendant.

"In Speektor vs. North British & Mercantile Ins. Co., 293 Pa. 232, where the facts were exactly the same as here, we held that the appeal would have to be quashed because not taken within the time specified in the Act of March 5, 1925, P. L. 23, which requires it to be taken within fifteen days after the ruling complained of, if made subsequent to the passage of the statute, or within fifteen days after its passage, if made before that time, the act further stating that '*a failure to appeal within the time* specified will be deemed a waiver of all objections to jurisdiction over the defendant personally.' We adhere to that ruling; and so doing requires us to hold that defendant, by not appealing until more than four years after the question of jurisdiction was decided against it and more than three and a half years after the passage of the Act, thereby waived the right to further object on that ground."

In *Connaway* ~~vs. Midland Bank~~ Reign of Moscow Bank, 178 U. S. 421, it is said:

"As to the suggestions that the suit was brought in the wrong district that objection, if it could be raised by the company at all, came

after the defendant had pleaded in bar and too late. Citing Texas & Pacific Ry. vs. Saunders, 151 U. S. 105; St. Louis & San Francisco Ry. vs. McBride, 141 U. S. 127; Texas & Pacific Ry. vs. Cox, 145 U. S. 593."

In the case of *Hess v. Conner*, 304 Pa. 74 cited by the learned counsel for the appellee, a partnership bill was filed and the defendant resists on the ground of lack of jurisdiction averring that Letters Testamentary were granted in the State of Florida and that the bill could only be maintained in the Courts of Florida. The Common Pleas of Philadelphia held that it had jurisdiction. The Supreme Court held:

"That defendant having by counsel entered a general appearance, instead of an appearance *de bene esse* as permitted by the Act of March 5, 1925, P. L. 23, her preliminary objections come too late and preclude her from questioning the court's jurisdiction."

The Court further said:

"Moreover, we have held the Act of 1925 applies only to cases where the court is either without jurisdiction over defendant or the cause of action for which suit is brought, and the 'jurisdiction over the cause of action, as that expression is used in the statute, has reference solely to the competency of the particular court to determine controversies of the general class to which the case then presented for consideration belongs.'"

Was the District Court of the United States "competent" to determine the controversy presented for consideration in the instant case insofar as

it was alleged that the cause of action was abated by the death of Ormsby under the law of New York.

Suppose the defendant in this case had presented a petition to his Honor Judge Dickinson under the provisions of the Act of 1925, setting forth that the defendant was advised that under the law of New York the death of Ormsby having intervened, the cause of action was abated and that, therefore, a suit brought in Pennsylvania after the death barred the right of action. Suppose further that Judge Dickinson, having adopted the view which he ultimately took when the question was presented to him, held that the petition was well founded and that the defendant was entitled to judgment. Would not that have been a proper exercise of his "jurisdiction of the cause of action" and would not the District Court have been "competent to determine the controversy thus presented"? We say that he would have had the right to determine that question.

We say that as the court had jurisdiction over this transitory cause of action in the first instance, the death of Ormsby did not destroy that cause of action in Pennsylvania no matter what the law of New York is, and the failure of defendant to have this question decided by the Act of 1925 is a waiver of their right even if it be conceded that the law of New York precludes action in Pennsylvania.

The learned counsel say in reply to this proposition:

> "By the same token it would follow that if the appellee desires to raise the point that the appellant had no cause of action because of her contributory negligence it could only be raised under the petition under the Act of 1925, and

could not properly be set forth in the Affidavit of Defense."

This argument is fallacious. There is no analogy between the two questions. If the plaintiff was guilty of contributory negligence that would be a defense on merits and would require proof. The finding of a jury or the determination of that question by the court if the facts were undisputed, would be essential. It would not take away from the plaintiff the cause of action until it was established by proof that notwithstanding the negligence of the defendant, the plaintiff was also guilty of negligence and thereby forfeit her right of recovery.

We assert, therefore, that the plaintiff has the right to maintain her action and that the entry of the non-suit under the circumstances was error.

Under all these authorities we, therefore, assert that when the statement of claim was filed in this case and served on the defendant and the defendant desired to raise the question as to the right of plaintiff to maintain her action in Pennsylvania, the duty of the defendant was clear. He should have presented a petition in accordance with the provisions of the Act of 1925, which would be in effect a statutory demurrer. The Court could then have disposed of the legal question promptly and without subjecting the plaintiff to the long delay and the expense incident to her coming to Philadelphia twice for the trial of the case. Had the decision of this Court been adverse, an appeal promptly taken would have settled the question now raised finally. Their failure to do so and filing the affidavit of defense disputing the questions of fact, cross examining the witnesses called when the

depositions were taken, and assuming that on the motion for the non-suit they would have cross examined the witnesses for the plaintiff, they thereby waived the right to raise this legal question.

Respectfully submitted,

EDWARD J. FOX,
EDWARD J. FOX, JR.,
WAYNE E. BARBER,
Attorneys for Respondent.

Fox & Fox,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 101.—October Term, 1933.

Laura Ormsby and B. Rush Field, Executors of the Estate of Frank G. Ormsby, Deceased, Petitioners,
vs.
Louise Chase, by Jesse Blythe, Prochein Ami, and Louise Chase, in her own right.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 11, 1933.]

Mr. Justice Butler delivered the opinion of the Court.

Frank G. Ormsby was a resident and citizen of Pennsylvania until his death June 14, 1926. He owned a building in New York City in which he maintained and operated a passenger elevator. Respondent was one of his tenants, and October 17, 1925, the elevator, in which she was being carried, fell, seriously injuring her. She did not sue him, but after his death, brought this suit in the federal court for the eastern district of Pennsylvania against his executors to recover damages on account of such injuries, alleging them to have been caused by the negligence of deceased. The affidavit of defense alleged that plaintiff's cause of action abated with the testator's death. The district court so held. 3 F. Supp. 680. The Circuit Court of Appeals reversed. 65 F. (2d) 521.

Plaintiff's statement of claim did not allege that her right of action survived the death of the deceased. It was not made to survive by any statute of New York, and under the common law there in force did abate with his death. *Gorlitzer* v. *Wolffberg*, 208 N. Y. 475. *Bernstein* v. *Queen's County Jockey Club*, 222 App. Div. 191.[1] She relies upon a Pennsylvania statute which declares that

[1] Blackstone, c. 20, p. 302. United States *v.* Daniel, 6 How. 11, 13. Henshaw *v.* Miller, 17 How. 212, 219. Martin *v.* Baltimore & Ohio Railroad, 151 U. S. 673, 697.

executors shall be liable to be sued in any action which might have been maintained against the deceased if he had lived. Laws 1921, No. 29, § 35 (b), p. 58. But the law of the place of the wrong determines whether the claim for damages survives the death of the wrongdoer. *Orr* v. *Ahern*, 107 Conn. 475. *Sumner* v. *Brown*, 312 Pa. 124. *Davis* v. *Mills*, 194 U. S. 451, 454.[2] Assuming Ormsby's negligence as alleged, the New York law, upon the happening of the accident, gave plaintiff a right of action. But the same law limited the right and made it to end upon the death of the tortfeasor. As actions for personal injuries are transitory, she might have sued him in Pennsylvania. *Tenn. Coal Co.* v. *George*, 233 U. S. 354. But when she sued she had no claim to enforce. *Hyde, Adm'r* v. *The Wabash, St. Louis & Pacific R'y Co.*, 61 Ia. 441, 443. She could derive no substantive right from the Pennsylvania survival statute. See *Sumner* v. *Brown*, *supra*. As there had been no suit, no question of revivor is presented. *Martin* v. *Baltimore & Ohio Railroad*, 151 U. S. 673, 691, *et seq.* *Baltimore & Ohio Railroad Co.* v. *Joy*, 173 U. S. 226. It results, therefore, that the judgment of the Circuit Court of Appeals cannot be sustained.

Reversed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[2] And see Davis v. New York & New England Railroad, 143 Mass. 301, 304. Needham v. Grand Trunk R. R. Co., 38 Vt. 294, 308-311. Hyde, Adm'r v. The Wabash, St. Louis & Pacific Ry. Co., 61 Ia. 441. Smith v. Condry, 1 How. 28, 33. Slater v. Mexican National R. R. Co., 194 U. S. 120, 126. Cuba R. R. Co. v. Crosby, 222 U. S. 473, 478. Tenn. Coal Co. v. George, 233 U. S. 354, 360. Western Un. Tel. Co. v. Brown, 234 U. S. 542, 546. Spokane Inland R. R. v. Whitley, 237 U. S. 494-495.